Supreme Court, U. S.
FILED
AUG 4 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1064

JACK B. KREMENS, Individually and as Hospital Director of Haverford State Hospital; FRANK S. BEAL, Individually and as Secretary of Public Welfare of the Commonwealth of Pennsylvania; WILLIAM B. BEACH, JR., Individually and as Deputy Secretary for Mental Health and Mental Retardation of the Department of Public Welfare of the Commonwealth of Pennsylvania,
Appellants,

v.

KEVIN BARTLEY; STEVE GENTILE; LESLIE LEVINE; VICKI MATHEWS; MARK WEAND, Minors, Through Their Next Friend, Individually and on Behalf of All Others Similarly Situated,
Appellees.

BRIEF AMICUS CURIAE OF MICHIGAN LEGAL SERVICES AND LEGAL SERVICES OF EASTERN MICHIGAN, AND APPENDIX

On Appeal from the Judgment of the United States District Court for the Eastern District of Pennsylvania

GABE KAIMOWITZ
MICHIGAN LEGAL SERVICES
900 Michigan Avenue
220 Bagley Avenue
Detroit, Mich. 48226

GARY J. KOLB
LEGAL SERVICES OF EASTERN MICHIGAN
412 Genesee Bank Bldg.
Flint, Mich. 48502

Interstate Brief & Record Co., 1615 Abbott St., Detroit, Michigan 48216
962-8745

MICHIGAN LEGAL SERVICES

900 MICHIGAN BLDG.
220 BAGLEY AVENUE
DETROIT, MICH. 48226
(313) 964-4130

August 6, 1976

Michael Rodak Jr.,
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Re: Jack B. Kremens, etc., et al.,
v. Kevin Bartley, et al., No. 75-1064

CORRECTION OF ERROR
In Brief Amicus Curiae of Michigan
Legal Services of Eastern Michigan,
And Appendix

Dear Mr. Rodak:

Enclosed please find 40 copies of this letter and accompanying Proof of Service correcting an error in the State of Position of Amicus Curiae on pages 6 and 7.

The entire text of the firt three paragraphs ending at footnote 7 is a direct quote from a Michigan Auditor General Report. The quote is fully set out in Appendix C.

As a quote it should have been indented appropriately.

Respectfully,

Gabe Kaimowitz

Gabe Kaimowitz

GK/sm

Enclosures

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Interest of Amicus Curiae	1
Summary of Argument	4
Statement of Position of Amicus Curiae	6
Argument	14
I. MINORS HAVE CONSTITUTIONAL RIGHTS INDEPENDENT OF RIGHTS GRANTED TO PARENTS OR THE STATES, ESPECIALLY WHEN THEIR LIBERTY IS AT STAKE	14
II. MINORS VOLUNTEERED FOR COMMITMENT TO PUBLIC MENTAL HEALTH INSTITUTIONS ARE IN CONFLICT WITH THE STATE, AND NOT NECESSARILY WITH THEIR PARENTS, GUARDIANS OR PERSONS IN LOCO PARENTIS	18
III. WHEN MENTAL HEALTH PROFESSIONALS, ACTING UNDER COLOR OF STATE LAW, INSTITUTIONALIZE MINORS, THE MINORS SHOULD BE AFFORDED DUE PROCESS OF LAW TO PROTECT THEM FROM THE UNBRIDLED DISCRETION, HOWEVER BENEVOLENTLY MOTIVATED, OF THE STATE	21

Page

IV. MINORS ARE ENTITLED TO TIMELY HEARINGS BEFORE THEY CAN BE INSTITUTIONALIZED BY MENTAL HEALTH PROFESSIONALS AS THEY ARE WHEN INSTITUTIONALIZED BY JUVENILE COURT AUTHORITIES 29

Conclusion 35

Appendix

A. First Page Of a Fund-Raising Newsletter Of The Michigan Association For Emotionally Disturbed Children To Apprise Its Membership Of The Organization's Participation as *Amicus Curiae* In This Case 36

B. Detroit Michigan News Articles of January 6 and 7, 1972, Concerning "Boy Challenges Commitment To Mental Institution." And "Grandparents To Take Boy Committed Against His Will." 37

C. Letter of July 10, 1975, And Section 8 On Family Care From The Report of The Auditor General of Michigan, On Caro Regional Center Of The Michigan Department of Mental Health 42

D. Stipulation To An Order, February 26, 1974, In Jobes v. Michigan Case No. 74-004-130-DC, (Wayne Cty. Cir. Ct., Mich., 1974) 44

E. Letter Opinion Of The Michigan Attorney General Of February 19, 1974 49

F. Letter Of The Chairman Of The Michigan House Judiciary Committee On Emergency Rule Concerning The Use Of State Mental Health Recipients In Medical Research 52

Page

G. Emergency Rule Concerning The Use of State Mental Health Recipients In Medical Research 53

H. Order Appointing Next Friend of March 9, 1976. Wojciehowski v. Director Of The Michigan Department Of Mental Health, et al., Case No. 75-72318 (E.D. Mich. 1975) 55

I. Order Amending Title of Case and Directing Clerk to Correct Court Records 60

J. Order Granting Motion to Intervene As Parties Defendant 62

K. Order Certifying Class Action of March 12, 1976, Wojciehowski v. Director, Supra 64

L. Order Appointing Next Friend of March 22, 1976, White v Michigan, Supra 68

M. Order Denying Certification Of A Class Of March 22, 1976, White v. Michigan, Supra 70

N. Memorandum Opinion of August 6, 1975, White v. Michigan Department of Mental Health, et al., Case No. 75-1002 (E.D. Mich. 1975) 72

TABLE OF AUTHORITIES

Cases

Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), prob. juris. noted, 44 U.S.L.W. 3530 (1976) 6-10,15

Bell v. Wayne County General Hospital, 384 F. Supp. 1085 (E.D. and W.D. Mich. 1974) 2,8

Page

Bellotti v. Baird, 44 U.S.L.W. 5221 (1976) 8,17,19

Breed v. Jones, 421 U.S. 519 (1975) 16

Buckholz v. Leveille, 37 Mich. App. 166, 194 N.W. 2d 427 (1971) 2,3

Chaloner v. Sherman, 242 U.S. 455 (1917) 20,29

Garvin v. Rosenau, 455 F. 2d 233 (6th Cir. 1972) 2

Geders v. United States, ___ U.S. ___, 96 S. Ct. 1330 (1976) 31

Gerstein v. Paugh, ___ U.S. ___, 95 S. Ct. 854 (1975) 21,32,33,34

Goss v. Lopez, 419 U.S. 565 (1975) 16

Gray v. Sanders, 372 U.S. 368 (1963) 14

Haley v. Ohio, 332 U.S. 596 (1948) 16

Heryford v. Parker, 396 F. 2d 393 (10th Cir. 1968) 26

In re Gault, 387 U.S. 1 (1967) . 7,14,15,17,21,22,26,29,30,35

In re Winship, 397 U.S. 358 (1970) 16

Jobes v. Michigan Department of Mental Health, No. 74-004-130-DC (Wayne County Cir. Ct. Mich., 1974) 3,9,10,14,20

Kaimowitz v. State Department of Mental Health, 42 U.S.L.W. 2063 (July 31, 1973) 22

Kent v. United States, 383 U.S. 541 (1966) 16

Kremens v. Bartley 10,15

Page

Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated and remanded, 414 U.S. 473 (1974), on remand, 379 F. Supp. 1376 (E.D. Wis. 1974), vacated and remanded, ___ U.S. ___, 95 S. Ct. 1943 (1975), on remand, Case No. 71C-602 (E.D. Wis. May 28, 1976) 23

Marsh v. State of Alabama, 326 U.S. 501 (1946) 20

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 32

O'Connor v. Donaldson, 422 U.S. 563 (1975) . 8,15,25,26

Planned Parenthood of Missouri v. Danforth, 44 U.S.L.W. 5197 (1976) 8,16,17

Powell v. Texas, 392 U.S. 514 (1968) 15,16,21,26

Prince v. Massachusetts, 321 U.S. 158 (1944) 18

Reist v. Bay Circuit Judge, 396 Mich. 326, 241 N.W. 2d 55 (1976) 2

Robinson v. California, 370 U.S. 660 (1962) 16

Schultz v. Borradaile, No. 74-4012 (E.D. Mich., filed October 25, 1974) 3

Specht v. Patterson, 386 U.S. 605 (1967) 26

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) 14,16

White v. Director of the Michigan Department of Mental Health, No. 75-10022 (E.D. Mich., filed March 7, 1975) 3,11-14

Wojciehowski v. Director of the Michigan Department of Mental Health, No. 75-72318 (E.D. Mich., filed November 24, 1975) 3,12-14,30,31

Page

Michigan Statutes

MCLA 330.1001 et seq. 3

MCLA 400.66(h) 19

H.B. 4704, introduced on March 20, 1975 3

Miscellaneous

American Bar Foundation (Brakel and Rock, editors) The Mentally Disabled and the Law (1971) 28

American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (2d Ed. 1968) 27

Ellis, Volunteering Children: Parental Commitment of Minors to Mental Institutions, 62 Calif. L. Rev. 840 (1974) 18,24

Goffman, Asylums, 6 (1961) 20

Goldstein, Freud and Solnit, Beyond the Best Interests of the Child, (1973) 18

Kaimowitz, Legal Emancipation of Minors in Michigan, 23 Wayne L. Rev. 19, 29, n. 38 (1972) 9

Mich. Aud. Gen. Audit Report, Caro Regional Center, Department of Mental Health, April 1, 1972 — April 30, 1974 (July 10, 1975) 7

Mich. Aud. Gen. Ann. Report Fiscal Year Ending June 30, 1974 (1974) 23

Mich. Aud. Gen. Audit Report, Use of Psychotropic Drugs, Department of Mental Health (April, 1975) .. 22

Pennsylvania Mental Health and Mental Retardation Act, 50 P.S. Sections 4402 and 4403 19

Rosenhan, On Being Sane in Insane Places, 13 Santa Clara Law, 379 (1973) 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1064

JACK B. KREMENS, Individually and as Hospital Director of Haverford State Hospital; FRANK S. BEAL, Individually and as Secretary of Public Welfare of the Commonwealth of Pennsylvania; WILLIAM B. BEACH, JR., Individually and as Deputy Secretary for Mental Health and Mental Retardation of the Department of Public Welfare of the Commonwealth of Pennsylvania,
Appellants,
v.
KEVIN BARTLEY; STEVE GENTILE; LESLIE LEVINE; VICKI MATHEWS; MARK WEAND, Minors, Through Their Next Friend, Individually and on Behalf of All Others Similarly Situated,
Appellees.

BRIEF AMICUS CURIAE OF MICHIGAN LEGAL SERVICES AND LEGAL SERVICES OF EASTERN MICHIGAN, AND APPENDIX

INTEREST OF *AMICUS CURIAE*

Michigan Legal Sevices and Legal Services of Eastern Michigan are non-profit charitable organizations funded by the Public Legal Services Corporation to provide

specialized civil legal services to eligible clients. They have offered such assistance in juvenile and mental health law since August, 1970, and through litigation and legislative reform, have fostered the rights of: minors,[1] persons deprived of fundamental rights,[2] and persons said to be mentally ill or mentally retarded to be free from State and/or institutional abuse, particularly unwarranted and unnecessary incarceration.[3]

Michigan Legal Services and Legal Services of Eastern Michigan are currently involved in numerous cases in the federal and State courts of Michigan on behalf of minors and adults alleged to be mentally ill or mentally retarded who will be directly affected by the outcome of this

---

[1]See, e.g., *Garvin* v. *Rosenau*, 455 F.2d 233 (6th Cir. 1972) (minors' right to pursue First Amendment aims in public schools); *Buckholz* v. *Leveille*, 37 Mich. App. 166, 194 N.W. 2d 427 (1971) (minor's right to access to court when in conflict with the interests of parents and school authorities).

[2]See, e.g., *Reist* v. *Bay Circuit Judge*, 396 Mich. 326, 241 N.W. 2d 55 (1976) (right to court-appointed counsel and free transcript for indigent parents in appealing the termination of their parental rights by the State).

[3]See, e.g., *Bell* v. *Wayne County General Hospital*, 384 F. Supp. 1085 (E.D. and W.D. Mich. 1974) (three-judge court) (right of adults alleged to be mentally ill to be free from unwarranted institutionalization and physically intrustive treatment).

litigation.[4] Both legal services organizations have acted and continue to act on behalf of eligible clients and at the request of State legislators to bring about changes in the Michigan Mental Health Code[5] and a proposed Juvenile Code.[6]

The purpose of Michigan Legal Services and Legal Services of Eastern Michigan in representing minors subjected to institutionalization in Michigan mental health facilities and appearing as *amicus curiae* in this action was best stated by the Michigan Court of Appeals in *Buckholz* v. *Leveille*, *supra* note 1, at 167:

> Courts must stand prepared to protect the rights of all citizens, including teenagers. Denying a teen-aged litigant access to our courts simply because he happens to be a minor not only tends to lessen the confidence of young people in our legal system but adds credence to the existence of the "generation gap". And it may even help widen that gap.

---

[4]See, e.g., *Schultz* v. *Borradaile*, No. 74-4012 (E.D. Mich., filed October 25, 1974) (three-judge court) (right of adults alleged to be mentally retarded to due process and equal protection of the law before they can be subjected to guardianships and administrative admission to State institutions); *White* v. *Director of the Michigan Department of Mental Health*, No. 75-10022 (E.D. Mich. filed March 7, 1975) (three-judge court) (right of a person to damages for unlawful institutionalization in a public health facility by Michigan in *loco parentis* when she was a minor); *Wojciehowski* v. *Director of the Michigan Department of Mental Health*, No. 75-72318 (E.D. Mich., filed November 24, 1975) (three-judge court) (right of minors alleged to be mentally ill or emotionally disturbed to due process and equal protection of the law before they are institutionalized in State mental health facilities); *Jobes* v. *Michigan Department of Mental Health*, No. 74-004-130-DC (Wayne County Cir. Ct. Mich., 1974) (right of minors, alleged to be mentally ill or mentally retarded, to due process and equal protection of the law before they can be placed in State mental health facilities and used for medical research and experimentation).

[5]MCLA 330.1001 *et seq.*

[6]HB 4704, introduction March 20, 1975.

SUMMARY OF ARGUMENT

Minors have constitutional rights, independent of rights granted to parents or the State. When their expressed constitutional right to liberty is at stake, minors should be afforded due process of law. When their confinement is threatened in a state institution, regardless of whether that facility is called a jail, receiving home, industrial school, residential treatment center, or mental hospital, minors should be entitled to the full panoply of rights at a judicial hearing.

Such a judicial hearing should be no different from one afforded to a minor charged with delinquent acts or anti-social behavior, since similar conduct often is the justification for confinement in a mental health facility. Therefore, minors being "volunteered" for admission in state mental health facilities constitutionally should be entitled to receive notice of the reasons for institutionalization, right to counsel and, if indigent, appointment of counsel, the right to confront witnesses and cross-examine them, and the protection of the privilege against self-incrimination.

In the mental health process, minors euphemistically are "volunteered" for confinement in state institutions, although they in fact cannot enter on their own, even if they are 16, 17, or, in some states, 18 or 19 years old. Some adult must consent to their entry. Under State laws, even those older teenagers are unable to use state mental health facilities as adults do who seek treatment on their own. Without authorization by the State, albeit in consultation with parents, guardians, or persons in *loco parentis*, minors cannot leave the facilities, as adults could who are similarly confined. For all intents and

purposes, they are confined at the discretion of the State since, under Pennsylvania or Michigan law, they cannot be heard in court without the assistance of the public institutions in which they are confined, except under unusual circumstances. Experience reveals that state mental hospitals do not always cooperate with minors who object to confinement, and the objections then go unheard.

The conflict then which is present in the case and controversy before this Court is between the State, which is authorized by law to accept people into public mental institutions, and the minors themselves, not necessarily one between minors and their parents or persons acting in *loco parentis* to them. Again this is the same kind of conflict adjudicated daily in state juvenile court systems throughout the country.

Since the issue is one of state mental health professionals acting under color of law to receive the minors, the *full* impact of the Due Process Clause in the United States Constitution must be applied to protect young people from unbridled discretion, however benevolently motivated, by the State.

The hearing therefore must be timely held, *before* the minors can be denied access to judicial scrutiny by being placed in total institutions, and at a time when they are at large to utilize the legal resources necessary to protect them from unwarranted institutionalization.

STATEMENT OF POSITION OF *AMICUS CURIAE*

I. IT IS THE BELIEF AND EXPERIENCE OF MICHIGAN LEGAL SERVICES AND LEGAL SERVICES OF EASTERN MICHIGAN THAT MINORS HAVE BEEN AND WILL CONTINUE TO BE INCARCERATED AT DIRECTION OF MENTAL HEALTH PROFESSIONALS IN PUBLIC FACILITIES IN MICHIGAN. WHEN PARENTS, GUARDIANS OR PERSONS ACTING IN *LOCO PARENTIS* ARE UNABLE OR UNWILLING TO PROVIDE CARE AND CUSTODY FOR THESE MINORS BECAUSE OF FAMILY AND RELATED PROBLEMS, MINORS WILL CONTINUE TO BE INSTITUTIONALIZED, OFTEN UNNECESSARILY, UNLESS THEY ARE AFFORDED DUE PROCESS OF LAW FOR THE REASONS STATED IN THE DECISION OF THE LOWER COURT IN *BARTLEY* V. *KREMENS*, 402 F. SUPP. 1039 (E. D. PA. 1975).

Our review of resident (family care) case files disclosed that the center's staff had determined that five residents in family care homes are not mentally retarded or epileptic. The residents had been transferred to Caro Regional Center from another State institution in March and July, 1972. The residents had been originally committed due to early cultural deprivation.

These five residents have been under the jurisdiction and funding (100% State funds) of the Department of Mental Health for a cumulative total of 49 years. They remained under department jurisdiction and funding for a cumulative total of 32 years after individual determinations were made that they were not retarded.

Since they have normal intelligence, they do not require the level of care purchased by the center, but rather the less expensive level of foster care available to foster children provided by the Department of Social Services. Center personnel agreed with us and extensive efforts have been made to remove the residents from the jurisdiction of the Department of Mental Health. However, because of the lack of established procedures, their efforts have not been successful.[7]

Recognizing the danger described above by the "volunteering" of persons, especially minors, for institutionalization which could continue for months or years without any assurance of "cure", a majority of a three-judge court in *Bartley* v. *Kremens*, 402 F. Supp. 1039 (E. D. Pa. 1975), ordered judicial scrutiny and afforded counsel for the minors before those minors could be placed, beyond access and legal recourse, in State mental health facilities. Such judicial hearings should be required by this Court in its review of the decision below in *Bartley* v. *Kremens*, *supra*. Rights granted to juveniles by this Court in *In re Gault*, 387 U.S. 1 (1967), should be assured to minors "volunteered" for admission to State mental health facilities.

The process hardly can be called "voluntary" when under Pennsylvania or Michigan law, a minor who is 16 or 17 *cannot get treatment* unless and until his parents, guardians, or persons in *loco parentis* consent to the minor's institutionalization; and even if he loudly and

---

[7]Mich. Aud. Gen. Audit Report, *Caro Regional Center, Department of Mental Health, April 1, 1971-April 30, 1974* (July 10, 1975).

vocally refused consent, he still can be "volunteered" by that same adult consenting for him. Whatever else this process may be, it certainly is not "voluntary" and should receive as much judicial scrutiny as is increasingly being given to adults who are involuntarily committed in state mental health facilities.[8]

Michigan Legal Services and Legal Services of Eastern Michigan acting on behalf of children institutionalized in State mental health facilities support the position of the Appellees in *Bartley* v. *Kremens, supra*, in the belief that minors should be allowed as much autonomy in seeking mental health care as they may in choosing abortions,[9] with whatever prior judicial review is required to assure that neither the minors nor their parents, guardians or persons in *loco parentis* are acting against the children's best interests. Without that autonomy, observed and nurtured under timely judicial scrutiny, it is likely that the Caro horror story previously described will continue to be repeated, and innocent minors will be helplessly imprisoned in institutions for months or years without meaningful access to legal resources to challenge their confinement.

---

[8]*O'Connor* v. *Donaldson*, 422 U.S. 563 (1975); *Bell* v. *Wayne County General Hospital, supra* note 3.

[9]See, e.g., *Planned Parenthood of Missouri* v. *Danforth*, 44 U.S.L.W. 5197 (1976). See also *Bellotti* v. *Baird*, 44 U.S.L.W. 5221 (1976).

II. LITIGATION INVOLVING INSTITUTIONALIZATION OF CHILDREN SAID TO BE MENTALLY HANDICAPPED IN MICHIGAN PROVIDES ADDITIONAL INSIGHT IN SUPPORT OF THE POSITION TAKEN BY APPELLEES IN *BARTLEY* V. *KREMENS, SUPRA*.

The problem of institutionalization of children said to suffer from mental disability first came to the attention of Michigan Legal Services in late 1971 when a teenager asked for legal representation to avoid being institutionalized by his parents in Hawthorn residential treatment center.[10]

Michigan Legal Services undertook the minor's representation,[11] and later obtained his release from Hawthorn after filing a writ of habeas corpus on his behalf.[12]

The next occasion Michigan Legal Services had to consider the issue was in late 1973 when a law guardian appointed by Juvenile Court asked for assistance on behalf of a seven-year-old who have been placed in a State mental health facility without a hearing and then subjected to medical research and experimentation without anyone's consent. Suit was filed in the name of the guardian *ad litem* on behalf of *all* children in State mental health facilities.[13]

---

[10]See Appendix, Affidavit of Ralph D. Rabinovich, M.D. submitted with the Brief for the Michigan Association of Emotionally Disturbed Children as Amicus Curiae, hereafter referred to as Hawthorn case summaries.

[11]See Kaimowitz, *Legal Emancipation of Minors in Michigan*, 23 *Wayne L. Rev.* 19, 29, n. 38 (1972).

[12]See Appendix, Detroit News articles of January 6 and 7, 1972, concerning "Boy Challenges Commitment to Mental Institution," and "Grandparents to Take Boy Committed Against His Will."

[13]*Jobes, et al* v. *Michigan Department of Mental Health, et al.* Case No. 74-004-130-DC (Wayne Cty. Cir. Ct., MI. 1974).

Michigan Legal Services initially reached an agreement with the State Attorney General which resolved the issue of institutionalization in much the same fashion as the majority below in *Bartley* v. *Kremens, supra.*[14] The State Attorney General also took steps on his own to prevent the use of State institutionalized children for medical research and experimentation.[15]

The Michigan Association for Emotionally Disturbed Children (hereafter referred to as MAEDC) then intervened, and proceedings were conducted which resulted in the opinion provided with MAEDC's *Amicus Brief* to this Court.[16] The Association has declined to make clear the extent to which it is speaking for parents, mental health professionals or children.[17] By so doing, it has failed to acknowledge the conflicts that may arise among all three groups, especially when mental health professionals act for the State. Such conflict has been recognized in the lower Court proceedings in *Kremens* v. *Bartley, supra,* and numerous other lower Court decisions.

During the *Jobes* v. *Michigan, supra* note 4, proceedings, a mother of a nine-year-old asked Michigan Legal Services to act on her daughter's behalf and stated that, as a public assistance recipient, she was unable to

---

[14]See Appendix, Stipulation for an Order, February, 26, 1974.

[15]See Appendix, Letter Opinion of February 19, 1974.

[16]See Brief of MAEDC as *Amicus Curiae* at Appendix, 4a, *Kremens* v. *Bartley*, No. 75-1064 (U.S. Oct. Term, 1976).

[17]See Brief of MAEDC as *Amicus Curiae, supra* at 2, in which MAEDC claims to represent some 2,000 parents, professionals and concerned citizens. Also see Statement of MAEDC in the Appendix submitted herewith. In that statement, the Michigan Association also seems to speak for children who wish to volunteer for institutionalization themselves, a position which has never been directly raised by that organization in court.

avoid State compulsion to have her consent to the institutionalization of her child and to that child's use for medical research purposes. The nine-year-old then was named as a plaintiff in the action.

The seven and the nine-year-old each spent more than six months on locked wards in a State mental health facility while they were being "diagnosed," but they were released months before the aforementioned opinion in that case. The case still is pending at the trial level until the State of Michigan first resolves the extent to which it will permit the use of minors in State mental health facilities for medical research purposes.[18]

Legal Services of Eastern Michigan was first asked to act on behalf of a minor placed in a public mental health facility, when a then 16-year-old's mother-in-law asked attorneys to intercede on the child's behalf. This occurred in January, 1975. It led to claims on the child's behalf which depended on whether it is lawful and constitutional for a minor to be "volunteered" against her will for institutionalization in a public mental health facility.[19]

Legal Services of Eastern Michigan, and Michigan Legal Services, which joined in representing Deborah White, the plaintiff, next were contacted by a social worker, Tom Wojciehowski. Mr. Wojciehowski asked

---

[18]See Appendix, Letter of the Chairman of the Michigan House Judiciary Committee, and Emergency Rule Concerning the Use of State Mental Health Recipients in Medical Research.

[19]*White* v. *Michigan Department of Mental Health, supra* note 4. (See Appendix, Memorandum Opinion of August 6, 1975, *White* v. *Director of the Michigan Department of Mental Health, supra* at note 4, among the various opinions and orders in the *White* action and the suit brought by Tom Wojciehowski as next friend, *infra.*)

these programs to act on behalf of a then 11-year-John Doe who had designated him to take whatever steps were necessary to get him out of the State mental health facility where he was being held. The hospital refused to take any action on behalf of the child. After an attempt to intervene the boy as a party in the *White* action failed, separate suit was filed on his behalf. *Wojciehowski* v. *Director of the Michigan Department of Mental Health*, *supra* note 4.[20]

---

[20]Contrary to the misrepresentations set forth on pages 8-11 of the Brief of MAEDC as *Amicus Curiae*, *supra* note 15, concerning the relationships and circumstances of the parties in *Wojciehowski* v. *Director of Michigan Department of Mental Health*, *supra* at note 4, and *White* v. *Director of Michigan Department of Mental Health*, *supra* at note 4, and the status of those cases in footnote 9 of the Brief of MAEDC as *Amicus Curiae*, *supra* note 15, the relevant facts are as set forth in the Appendix in the various Orders and Opinions of the two cases.

a. Tom Wojciehowski was found to be a suitable next friend for John Doe, after the federal court established that he had no conflict of interest because he no longer was employed or acting as big brother for the child at the institution where the minor was being held. See Appendix, Order of March 7, 1976, appointing next friend in *Wojciehowski* v. *Director of Michigan Department of Mental Health*, *supra* at note 4.

b. That Court found that there was no reason to believe he had not made a good-faith judgment to ask the child's attorneys to commence the federal court action on his behalf. *Id.*

c. That Court did deny access by next friend or the attorneys to the child, because contact "is likely to cause conflict between them and the parents and parents and the child that would not be beneficial to the child." *Id.*

d. Contrary to its statement to this Court, MAEDC is *not* a party to the *Wojciehowski* v. *Director of Michigan Department of Mental Health*, *supra* at note 4, action. The Association's attorneys ostensibly are solely involved on behalf of John Doe's parents who were permitted to intervene. (Order of March 9, 1976, granting motion of Mr. and Mrs. Doe to intervene as parties defendant.) This again raises the issue as to whether *parents* truly are represented in *Kremens* v. *Bartley*, *supra*, or similar proceedings in other states, or whether MAEDC and other groups supporting the interests of mental health professionals are riding the coattails of the family when action is brought on behalf of minors against the State.

(Cont'd on next page)

It is the belief of Michigan Legal Services and the Legal Services of Eastern Michigan programs that these situations will continue to arise haphazardly with hindrance rather than assistance of State mental health professionals, whenever a minor somehow finds access to a next friend or attorney willing to act on his or her behalf, unless orderly judicial scrutiny is imposed upon the process, as is provided for by the lower court in *Kremens* v. *Bartley*, *supra*.

(Cont'd from preceeding page)

e. Wojciehowski is being allowed to proceed on behalf of "all persons under 18 years of age who have been, or are or will be admitted to hospitals under the Formal Voluntary Admission Sections of the Michigan Mental Health Code," applicable to children who are deemed to be clinically suitable for admission. Clinical suitability is not otherwise defined in the Michigan Mental Health Code. See Appendix, Order Certifying that Suit May Proceed as Class Action.

f. The Court rejected the argument that there was a factual basis to support the argument that representation of the class might be harmful to minors. It said that would be an issue to be considered on the merits before the three-judge court that had been convened in the case.

g. When Michigan Legal Services and Legal Services of Eastern Michigan perceived that there might be a conflict between a next friend and a minor, as they did in the Deborah White case, they moved on behalf of the child to substitute a next friend, and the Court granted the substitution. See Appendix, Order Appointing Next Friend in *White* v. *Director of Michigan Department of Mental Health*, *supra* at note 4, on March 22, 1976.

h. Although a three-judge court has been convened in *White* v. *Director of Michigan Department of Mental Health*, *supra*, as well as it has been in *Wojciehowski* v. *Director of Michigan Department of Mental Health*, *supra* at note 4, the convening judge in *White* v. *Director of Michigan Department of Mental Health*, *supra* at note 4, perceived there was no necessity to certify an additional class, because Deborah White already was represented in the class certified in *Wojciehowski* v. *Director of Michigan Department of Mental Health*, *supra* at note 4, for purposes of declaratory and injunctive relief, although she would require a next friend for her damage claim during the remainder of her minority. (See Order Denying Classification of Suit as a Class Action, dated March 22, 1976, in *White* v. *Director of Michigan Department of Mental Health*, *supra* at note 4.)

It is the experience of Michigan Legal Services and the Legal Services of Eastern Michigan program that the Formal Voluntary Admission provisions of the Michigan Mental Health Code, which resemble Pennsylvania's laws in most material respects have not basically altered the process of parents, guardians or persons in *loco parentis* "volunteering" minors into State mental health facilities where they are out of sight from and away from access to legal resources. The 1971 commitment of the teenager to Hawthorn and *Jobes* v. *Michigan Department of Mental Health, supra* note 4, arose before the Michigan Mental Health Code went into effect in August, 1974; the cases of *Wojciehowski* v. *Director of Michigan Department of Mental Health, supra*, and *White* v. *Director of Michigan Department of Mental Health, supra* at note 4, arose thereafter. Under such circumstances, this Court should look to the actual practice rather than the change in law when considering whether due process or equal protection of the laws must be applied. *Gray* v. *Sanders*, 372 U.S. 368, 372-73 (1963).

ARGUMENT

I.

MINORS HAVE CONSTITUTIONAL RIGHTS INDEPENDENT OF RIGHTS GRANTED TO PARENTS OR THE STATES, ESPECIALLY WHEN THEIR LIBERTY IS AT STAKE.

The Bill of Rights and the Fourteenth Amendment are not soley limited to adults. *In re Gault*, 387 U.S. 1, 13 (1967). In *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 506 (1969), this Court said that "(i)t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

Certainly it would be anomalous to say that minors shed their right to liberty outside the institutional walls of State mental health facilities, just because the State has promised to provide services to them within. *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975). As this Court stated in *Powell* v. *Texas*, 392 U.S. 514, 529 (1968):

> One virtue of the criminal process is, at least, that the duration of penal incarceration typically has some outside statutory limit; this is universally true in the case of petty offenses, such as public drunkenness, where jail terms are quite short on the whole. 'Therapeutic civil commitment' lacks this feature; one is typically committed until one is 'cured.' Thus, to do otherwise than affirm might subject indigent alcoholics to the risk that they may be locked up for an indefinite period of time under the same conditions as before, with no more hope than before of receiving effective treatment and no prospect of periodic 'freedom.'

Like the adult alcoholic, the juvenile could be assured of due process of law in a court, if the allegations of deviant behavior were considered as legal problems of delinquency and neglect rather than as mental health problems requiring "treatment."[21]

Also, distinction between "civil" and "criminal" matters has been stripped bare by this Court when the incarceration of the minor is at issue. *In re Gault, supra*,

---

[21]See, e.g. *In re Gault, supra*. See also the *Hawthorn* case summaries, Brief of MAEDC as *Amicus Curiae*, Appendix, 82a-124a. *Kremens v. Bartley*, No. 75-1064 (S.C. October Term 1976) and discussion *infra* of those case summaries.

at 50. Likewise in *Powell, v. Texas, supra,* it was recognized that institutionalization of the person was the key question when sanctions, criminal or civil, were imposed. The Court emphasized the importance of the earlier case of *Robinson* v. *California,* 370 U.S. 660, (1962) in preventing the imposition of cruel and unusual punishment by incarceration for those "convicted" of "being a chronic alcoholic, being mentally ill, or a leper . . . ." *Powell* v. *Texas, supra* at 532-534. The importance of liberty to an individual who has not been convicted of what generally has been regarded as criminal behavior appears to be the thread binding the aforementioned cases, whether they concerned juveniles or adults.

This Court repeatedly has recognized the similarity between the rights of minors and the rights of adults when confinement and deprivation of liberty were at stake. See e.g. *Breed* v. *Jones,* 421 U.S. 519 (1975); *In re Winship,* 397 U.S. 358 (1970); *Kent* v. *United States,* 383 U.S. 541 (1966); *Haley* v. *Ohio,* 332 U.S. 596 (1948).

As already noted in *Tinker* v. *Des Moines Independent School District, supra,* and in a case such as *Goss* v. *Lopez,* 419 U.S. 565 (1975), in which minors were found to be entitled to some form of due process when a school suspension of less than 10 days was at stake, this Court increasingly has become cognizant of the need to protect minors from overbearing State authority in other areas of the law as well.

Most recently in *Planned Parenthood of Missouri* v. *Danforth,* 44 U.S.L.W. 5197 (1976), this Court strongly reiterated its support for the proposition that minors have constitutional rights independent of rights granted to parents or the states. The Court held that minors could

determine whether they should have abortions, or at least be entitled to judicial scrutiny if their parents or authorized agencies did not believe the decisions made by the young people were in their "best interests." See also *Bellotti* v. *Baird,* 44 U.S.L.W. 5221 (1976). In *Planned Parenthood of Missouri* v. *Danforth, supra,* at 5204, the Court decided:

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

This Court's holding was based on the minors' implied right of privacy. Surely when the United States Constitution has given all persons, including minors, the express right to liberty, juveniles should be allowed to make their own judgment whether they wish to enter an institution or, if they are not competent because of their lack of maturity to give such consent, to benefit from judicial scrutiny to assure that they receive due process of law. Neither the Pennsylvania nor the Michigan law concerning the so-called "voluntary" admission of minors to mental health facilities guarantees young people either the right to consent or the right to a hearing *before* they are placed in institutions. See *In re Gault, supra.*

II.

MINORS VOLUNTEERED FOR COMMITMENT TO PUBLIC MENTAL INSTITUTIONS ARE IN CONFLICT WITH THE STATE, AND NOT NECESSARILY WITH THEIR PARENTS, GUARDIANS OR PERSONS IN LOCO PARENTIS.

The conflict between the minors and the State begins, not with the decision by the parent or person in loco parentis to commit the minor to a public facility,[22] but rather with the enactment of a statute and/or administrative regulatory scheme that delegates the

[22]Generally positive motives are ascribed to parents and guardians who volunteer children for institutionalization. They do not, however, "have a conflict-free interest in representing the child." Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child*, 66 (1973). Potential and mentally abusive parents, 'scapegoating' by parents, familial 'pseudo-mutuality' and disorders within the family can result in minors being volunteered for institutionalization. See Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 Calif. L. Rev. 840, 857-862 (1974). Parental motives are not at issue here; state action, in responding to what is perceived as parental intent, is. The possibility of such conflict was recognized in *Prince* v. *Massachusetts*, 321 U.S. 158, 170 (1944), when this Court specifically noted that parents or persons in *loco parentis* could make martyrs of themselves, but not of the children in their care.

authority to commit the minors to those mental health institutions without affording them substantial procedural protections.[23]

The State has created and maintained this conflict by refusing to provide timely procedural safeguards to protect minors from unwarranted institutionalization, the same safeguards it affords in probate courts to adults being committed involuntarily, and in juvenile courts to minors being committed involuntarily because of delinquency on their part, or neglect on the part of their parents.[24]

[23]Michigan does not allow any child or adult to be hospitalized for surgical or medical treatment by any physician or surgeon, or any office or representative of the state or county departments of social welfare," contrary to the wishes of said person" unless the person is not in a position to make decisions for himself. MCLA Sec. 400.66h. Presumably some children are considered in positions to make decisions for themselves and would require a court hearing to determine their competency to do so, if mental health in Michigan is regarded as a form of medical treatment. This statutory provision has never been interpreted. See also *Bellotti* v. *Baird*, *supra*, remanded by this Court so that Massachusetts courts could determine whether state law permitted minors to consent to abortions, or receive judicial scrutiny if their parents "vetoed" their right to necessary medical procedures.

[24]Pennsylvania Mental Health and Mental Retardation Act, 50 P.S. Sections 4402 and 4403.

Furthermore, it is not the offering of the minors for institutionalization by parents or persons in loco parentis but the acceptance by the State of these children whom it finds to be clinically suitable for admission that is the case and controversy before this Court. It is not known how often the parents have acted on their own, or only moved to have their offspring committed when they were advised or told to have their children admitted for diagnosis or treatment by mental health professionals.[25] It is the state action that should be subjected to judicial scrutiny, not the motives or intent of the parents or persons acting in *loco parentis*.

Finally, while the State seeks to avoid public scrutiny of its action in accepting those deemed clinically suitable, it is the minor who inevitably suffers the consequences of not having notice of the reasons for confinement, an opportunity, with the assistance of counsel, to confront mental health professionals acting for the State, and a chance to be heard. See *Chaloner* v. *Sherman*, 242 U.S. 455 (1917). The minor winds up being placed in a total institution, away from the nurturing atmosphere of a home in the community, in a place where every aspect of his or her life is completely regulated by impersonal authority. Goffman, *Asylums*, 6 (1961). This Court long has been aware of the dangers posed by total communities to constitutional rights, because of the ability in such an environment to control the views of those within them, and to keep dissenting voices out. *Marsh v. State of Alabama*, 326 U.S. 501 (1946).

---

[25]See *Jobes v. Michigan*, *supra*, note 4, and Brief of MAEDC as *Amicus Curiae*, *supra*, note 21, Appendix 4a.

In the final analysis, it is the State which creates, prolongs, or resolves the conflict rather than the minors themselves or their parents, guardians or persons acting in *loco parentis*. This would not be tolerable in our society when minors and their parents or persons in *loco parentis* are facing charges of delinquency or neglect which may result in institutionalization in youth homes or child care facilities. *In re Gault, supra*. It should not be considered any more reasonable to avoid *timely* judicial scrutiny of State action when the minors are put away to be "cured." *Powell v. Texas, supra* at 529; *Gerstein v. Pugh*, _____ U.S. _____, 95 S. Ct. 854 (1975).

III.

WHEN MENTAL HEALTH PROFESSIONALS, ACTING UNDER COLOR OF STATE LAW, INSTITUTIONALIZE MINORS, THE MINORS SHOULD BE AFFORDED DUE PROCESS OF LAW TO PROTECT THEM FROM THE UNBRIDLED DISCRETION, HOWEVER BENEVOLENTLY MOTIVATED, OF THE STATE.

Institutionalization of a minor in a mental facility is the ultimate deprivation of the minor's liberty. As the Court described the analogous situation of the institutionalized juvenile in *In re Gault, supra* at 27:

> A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence — and of limited practical meaning — that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of

> confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours * * *.' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide.

Indeed, the so-called "voluntary" commitment of minors, who have committed no crimes and are incarcerated solely for alleged purposes of "treatment," are more severely deprived of their liberty than delinquents. They may be subjected to more serious institutional conditions such as being placed on the same ward with adults, physically attacked or abused by other patients, exposed to chronic dysfunctional behavior and forced to take drugs that serve no purpose other than to keep the minors in a constant stupor.[26]

Institutionalized persons are subjected to medical research and experimentation. See *Kaimowitz* v. *State Department of Mental Health*, 42 U.S.L.W. 2063 (July 31, 1973). A recent Annual Report of the Michigan

---

[26]A recent study by the Auditor General of Michigan reported that the Michigan Department of Mental Health purchased a total of $1,331,000 in psychotropic drugs for the calendar year 1974. In a review of the records of eight State hospitals, the Auditor General found that 30% of the patients received psychotropic drugs in excess of recommended maximums, 40% of the patients received antiparkinson drugs on a routine basis or for prolonged periods, and the practice of utilizing "drug holidays" was almost non-existent. Mich. Aud. Gen. Audit Report, *Use of Psychotropic Drugs, Department of Mental Health*, 1, 3, 4 (April, 1975).

Auditor General verifies this conclusion by stating that the Michigan Department of Mental Health is "responsible for . . . promoting research of the causes and prevention of mental disorders." Mich. Aud. Gen. Ann. Report Fiscal Year Ending June 30, 1974, 115 (1974). Drug studies are an important aspect of this research.

> Audits of institutions for the mentally handicapped revealed that the institutions received monies from pharmaceutical firms as a direct result of drug studies performed. These studies were performed utilizing State-supported facilities and staff, and the monies received were retained at the institution as gifts, bequests and donations.
>
> Mich. Auditor Gen. Ann. Rep. Fiscal Year Ending June 30, 1974.

Also, the stigma of being known as an "ex-mental patient" has a serious effect on the life of the formerly institutionalized person. The "former mental patient will encounter serious obstacles in attempting to find a job, sign a lease or buy a house," even to a greater extent than an ex-felon. *Lessard* v. *Schmidt*, 349 F. Supp. 1078, 1089 (E.D. Wis. 1972), vacated and remanded on other grounds, 414 U.S. 473 (1974), on remand, 379 F. Supp. 1376 (E.D. Wis. 1974), vacated and remanded on other grounds, 95 S.Ct. 1943 (1975), on remand case No. 71C-602, (E.D. Wis. May 28, 1976).

The minor's perception of his own identity can be permanently damaged.

> The 'crazy' label can also have a powerful impact upon the self-concept of the person institutionalized, especially where that person is

young and impressionable. Scheff argues that this kind of labeling is the single most important cause of 'careers of residual deviance.' The act of labeling reverses the presumption of normality which is usually accorded a person's actions. Since the presumption of abnormality attaches to the 'former mental patient,' the amount of deviance in his or her behavior will be exaggerated in the perception of others, and perhaps in fact. Oddities of behavior which would not be noticed in a 'normal' person will be seen as proof of continued craziness in a former mental patient. Craziness will be found in these actions, and the label will be renewed and confirmed.

Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 Cal. L. Rev. 840, 870 (1974).

The institutionalization of minors has increased dramatically. The involuntary aspect of the so-called "voluntary" commitment statutes is one cause of this increase.[27] The "uncertainties" of the psychiatric process

---

[27]In 1952, only 9 states had laws allowing parents to "voluntarily" commit minors. Today, most states have such laws. The accompanying increase in the number of minors in mental institutions is evident. Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 Cal L. Rev. 840, 844 (1974). For example, in 1975, the proportion of the California state hospital population under the age of 21 was 1.3 percent; in 1969, patients under 21 constituted 9.2 percent of the hospital population. Nationally, the number of hospitalized middle-aged patients has been decreasing while the number of patients between ages 15 and 24 has increased, the number of patients under age 15 increasing most sharply. Id. at 845.

is another cause of continued and increased institutionalization of minors.[28] As Chief Justice Burger stated in his concurring opinion in *O'Connor* v. *Donaldson, supra*, at 45 L. Ed 2d 396, 412:

> The Court appropriately takes notice of the uncertainties of psychiatric diagnosis and therapy, and the reported cases are replete with evidence of the divergence of medical opinion in this vexing area. E.g., *Greenwood* v. *United States*, 350 U.S. 366, 375, 76 S. Ct. 410, 100 L. Ed. 412 (1956). See also *Drope* v. *Missouri*, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975).

Institutionalization of minors and the resulting severe deprivations of liberty, dignity and the pursuit of happiness dramatically illustrate the need for substantial due process safeguards.

> There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law. *Specht* v. *Patterson*, 386 U.S., at 608, 18 L. Ed. 2d 326, 87 S. Ct. 1209. Cf. *In re Gault*, 387 U.S. 1, 12-13, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967). Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular

---

[28]Recent experiments by Dr. David L. Rosenhan dramatize the extent of incorrect diagnosis resulting in institutionalization. In the experiment involving eight normal patients who sought admission to twelve different hospitals, exhibiting only the hearing of voices saying something like "empty" or "thud", all eight "pseudopatients" were admitted to each of the twelve hospitals with a diagnosis of schizophrenia or manic-depressive psychosis. Rosenhan, *On Being Sane in Insane Places*, 13 *Santa Clara Law*. 379, 381 (1973).

individual must be established in an appropriate proceeding.

O'Connor v. *Donaldson, supra* see 45 L. Ed. 2d 396, 410 (Burger, C.J. concurring)

Unlike the criminal process which has a statutorily fixed outside limit of incarceration, persons committed to mental institutions "may be locked up for an indefinite period of time under the same conditions as (jail) . . . and no prospect of periodic 'freedom'." *Powell* v. *Texas, supra* at 529. "Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in *parens patriae*, it has the unescapable duty to vouchsafe due process . . ." *Heryford* v. *Parker*, 396 F. 2d 393, 396 (10th Cir. 1968).

In *In re Gault, supra*, the Court said that "(t)he problem is to ascertain the precise impact of the due process requirement upon such proceedings." The Court stated that the minor's deprivation of liberty was equivalent to a convicted adult in a criminal case except that the "safeguards available to adults were discarded" in the minor's case. *Id.* at 29. The Court held that the minor was entitled to receive: notice of the charges; right to counsel and, if indigent, appointed counsel; the right to confront witnesses and cross-examine them; and the privilege against self-incrimination. *Id.* at 33, 41, 55-56.

The placement of a minor in a mental institution is as much a serious deprivation of liberty as a commitment to a training school. The deprivation of liberty subject to the Due Process Clause of the Fourteenth Amendment is the same whether it emanates from proceedings labeled "ciminal" or "civil." See *In re Gault, supra*, at 50; *Specht* v. *Patterson*, 386 U.S. 605, 608 (1967).

In fact, many minors have been institutionalized for the same behavior that would have required substantial due process safeguards in a juvenile court hearing. The Brief of Amicus Curiae MAEDC provides many illustrations of typical case histories of minors at the Hawthorn Center, an institution providing "treatment, training and research in child psychiatry under the Department of Mental Health, State of Michigan."[29] Minors are confined in the Hawthorn Center for the so-called "treatment" of a "relatively affectionless personality,"[30] "chronic deprivation and neglect"[31] and "psychoneurosis,"[32]

---

[29]Brief of MAEDC as *Amicus Curiae*, *supra* note 21, Appendix at 82a-124a.

[30]*Id.* at 84a, 87a, 88a, 115a, 117a-118a, 123a (minors Nos. 8, 19, 22, 119, 129, 148).

[31]*Id.* at 84a, 86a, 90-91a, 99a, 100a, 101a, 106a, 107a, 109a, 113a, 115a, 117-118a, 120a, 121a, 123a (minors Nos. 9, 14, 32, 33, 64, 69, 71, 89, 93, 99, 112, 119, 129, 132, 138, 139, 142, 148).

[32]*Id.* This term is the primary diagnosis in more than half of the Hawthorn case summaries.

The most recent *American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders* (2d Ed. 1968), indicates that the term "psychoneurosis" has been discarded as a diagnostic tool but is applicable to conditions now referred to as "neurosis."

> The neuroses, as contrasted to the psychoses, manifest neither gross distortion or misinterpretation of extended reality, nor gross personality disorganization . . . .
>
> Traditionally, neurotic patients, however severely handicapped by their symptoms, are not classified as psychotic because they are aware their mental functioning is disturbed.

The danger of locking up "psychoneurotics" was set forth more than a generation ago, in a law review article cited favorably in

(Cont'd on next page)

accompanied by various acting out behavior. Such terms, without due process safeguards, allow the wrongful commitment of minors who may be unwanted by their families, mistreated or otherwise labeled "different" from other minors.

The provision of substantial due process safeguards, as are presently provided to juveniles in the juvenile justice system, will prevent wrongful institutionalization of minors and enhance the various governmental interests. The risks of erroneous deprivation, however beneficially imposed, of a minor's liberty for whatever reason, will be dramatically lessened.

(Cont'd from preceeding page)

American Bar Foundation (Brakel and Rock, editors) *The Mentally Disabled and the Law* (1971):

> (The Draft Act for the Hospitalization of the Mentally Ill) would allow the indeterminate hospitalization of the severe "neurotic" or "psychoneurotic" against their will. Such a person would seldom meet the legal criterion of mental incompetency, although he might because of his illness lack sufficient insight to make a proper decision regarding his need for hospitalization or medical care. This would appear to be new law when broadly interpreted. It cannot rest on the doctrine of *parens patriae* nor can it rest on the public health or police powers of the state.
>
> Whitmore, *Comments on a Draft Act for the Hospitalization of the Mentally Ill*, 19 *Geo. Wash. L. Rev.* 512, 522-23 (1952).

The article then significantly footnotes the last point:

> The law has dealt previously with the "insane" and with "incompetency" and legal doctrine have been built around these concepts. Now we are dealing with a new term "mental illness." The definition of the term as given in the Draft Act . . . makes medical sense but when used as a criterion for involuntary hospitalization of indeterminate duration accompanied only by the finding that the sick person needs medical care and does not know it, such use would seem to be without basis in our present law. Such a provision cannot rest on the doctrine of *parens patriae* . . .; nor does it fall within the doctrine of danger to oneself or to others . . . . It

(Cont'd on next page)

IV.

MINORS ARE AS ENTITLED TO TIMELY HEARINGS BEFORE THEY CAN BE INSTITUTIONALIZED BY MENTAL HEALTH PROFESSIONALS AS THEY ARE WHEN INSTITUTIONALIZED BY JUVENILE COURT AUTHORITIES.

About 60 years ago, this Court was confronted with the problem of what to do when persons said to be incompetent to handle their own affairs were deprived of property or liberty. *Chaloner* v. *Sherman, supra*. This Court found that such persons were protected when they had notice and an opportunity to be heard. It then examined whether the state law in question had afforded such notice and opportunity at each stage of the proceedings considered vital to safeguard the individual's right to due process of law. As already noted, similiar examination has been given by this Court when a minor charged with a delinquent act was institutionalized in a State Industrial School. *In re Gault, supra*.

(Cont'd from preceeding page)

> would be difficult to reconcile with the use of state power in public health. The power of the state to quarantine a person suspected of having or being exposed to a contagious disease was upheld . . . but quarantine is (a) imposed for a definitely limited period of time, (b) based on the diagnosis of illness having clearer diagnostic criteria, which may often be verified by objective scientific laboratory tests, and (c) is for the purpose of protecting the public from diseases which are known to spread from one person to another. A mental illness cannot be classified as a contagious disease. While the Draft Act is in no sense a criminal statute it does possess the basic similarity that under it the individual may be deprived of his liberty. The provision under discussion here might be attacked on the grounds of vagueness . . .

The article goes on to conjecture that the public welfare might be used to justify the confinement of "psychoneurotics but it is seriously questioned if the public welfare is sufficiently involved to support the deprivation of liberty involved." *Id.* at 523.

In *In re Gault, supra,* it was found that such a minor must receive at least notice of the charges against him, assistance of counsel, the opportunity to be heard including the right to confront and cross-examine witnesses, and the protection of the privilege against self-incrimination.

However, today, when a minor is shunted onto the mental health track, rather than up the juvenile justice system line, even though exactly the same type of conduct might be involved (see *Hawthorn* case summaries), lower courts still are uncertain whether the child is entitled to the same protection. In Michigan, a federal district court convened a three-judge court to consider some of the same issues raised by Appellees herein. It determined that the named Plaintiff could represent all persons under 18 years of age who have been, now are, or will be admitted to hospitals under the Formal Voluntary Admission sections of the Michigan Mental Health Code. Then the Court denied the minor access to his next friend or counsel in *Wojciehowski v. Michigan, supra,* note 4.[33]

---

[33](T)he Court will enter no order directing either the intervening parents or the defendants to permit Mr. Wojciehowski, or counsel for plaintiff to have access to the minor child. If plaintiff's counsel become aware of any particular reason why such contact is necessary they may make a written application to the Court with notice to the other parties. The Court recognizes that this procedure may prevent Mr. Wojciehowski from becoming aware of facts that might lead him to dismiss or otherwise alter the course of this action. However, the Court is of the opinion it is in the best interest of the child that contact between the next friend or plaintiff's attorneys and the minor is likely to cause conflict between them and the parents and parents and child that would not be beneficial to the child.

See Appendix, Order of March 9, 1976, Appointing Next Friend in *Wojciehowski v. Michigan Department of Mental Health Director, supra* note 4.

Obviously, Amici herein do not agree with that position which was taken by the lower federal court in *Wojciehowski v. Michigan, supra,* note 4, but cite it as an example of how a child may be detained in a state mental health facility, and denied access to adults legally authorized to represent him, even after a Court recognizes that his constitutional right to liberty is at stake. Certainly if he were an adult, no court cognizant of constitutional rights would permit such denial of access to attorneys or next friends:

> There are a variety of ways to further the purpose served by sequestration without placing a sustained barrier to communication between a defendant and his lawyer. To the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper 'coaching,' the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel. *Brooks* v. *Tennessee,* 406 U.S. 605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972).
>
> *Geders* v. *United States,* 96 S. Ct. 1330 (1976), at 1337.

The fact that *Kremens* v. *Bartley, supra,* or *Wojciehowski* v. *Department of Mental Health Director, supra* at note 4, concern juveniles rather than adults, should not alter the nature of those rights, such as access

to counsel, because the State or parents might object to their having their own attorneys:

> In my view, therefore, the due process question cannot be decided upon the basis of general characteristics of juvenile proceedings, but only in terms of the adequacy of a particular state procedure to 'protect the (juvenile) from oppression by the Government,' *Singer* v. *United States*, 380 U.S. 24, 31, 85 S. Ct. 783, 788, 13 L. Ed. 2d 630 (1965), and to protect him against "the compliant, biased, or eccentric judge." *Duncan* v. *Louisiana*, 391 U.S. 145, 156, 88 S. Ct. 1444, 1451, 20 L. Ed. 2d 491 (1968). *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 554, 91 S. Ct. 1976, 1991 (1971) (Justice Brennan concurring).

The Court now is being asked to examine the adequacy of the procedure under state laws that allow minors to be "volunteered" into state mental health facilities under conditions that are not applicable to adults being involuntarily committed, or to juveniles in the juvenile justice system. Again, as in *McKeiver* v. *Commonwealth of Pennsylvania*, *supra*, that State argues that a special procedure should be applied, because the mental health of these children is involved — not because these minors truly are volunteering or consenting to their admission.

This Court only recently reviewed procedures suggested by the State of Florida as being sufficient to protect people's rights prior to a criminal proceeding against them — and found them wanting for many of the same reasons which should be applicable here. *Gerstein* v. *Pugh*, *supra*:

> The issue in this case is whether a person arrested under a prosecutor's information is

> constitutionally entitled to a judicial determination of probable cause for pre-trial restraint of liberty.
>
> *Gerstein* v. *Pugh*, *supra* at 858.

In *Gerstein*, *supra*, this Court called for separate functions between those involved with the making of the arrest — the police and the prosecutor — and those who must determine whether there was probable cause to believe the arrest was warranted:

> The reason for this separation of functions was expressed by Justice Frankfurter in a similar context: 'A democratic society in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. . . . *McNabb* v. *United States*, 318 U.S. 332, 343, 63 S. Ct. 608, 614, 87 L. Ed. 819 (1943).'
>
> *Gerstein* v. *Pugh*, *supra* at 865.

Likewise here, the State role in institutionalizing minors in mental health facilities must be separated from the judicial function of determining whether such institutionalization is justified. The State's role in "treating" the minor certainly must be separated from "assisting him to object" to hospitalization after the minor is likely to have been institutionalized.

The Court in *Gerstein v. Pugh, supra*, extensively examined the extent of the proceedings required and the timeliness of those proceedings in determining how extensive the rights of the accused should be. It relied on the extent of harm to be done, and whether the proceeding was at a "critical stage." Although it found that a probable cause hearing was not a critical stage to require an adversary proceeding, it set forth guidelines. Those guidelines would indicate when persons who might be subjected to long-term institutionalization from the time of placement in a state institution, are at a critical stage:

> The Court has identified as 'critical stages' those pre-trial procedures that would impair defense on the merits if the accused is required to proceed without counsel. (citation omitted.)
>
> *Gerstein* v. *Pugh, supra* at 867.

The Court concluded in language applicable to this matter before it:

> Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pre-trial restraint on liberty, and this determination must be made by a judicial officer either before or promptly after arrest.
>
> *Gerstein* v. *Pugh, supra* at 869.

Neither the State of Pennsylvania, nor the State of Michigan, has adopted a procedure that would be a fair and reliable determination of probable cause that a minor should be institutionalized in a state mental health facility, especially in light of the fact that the only real opportunity the child has for a hearing in either state comes after institutionalization, and after the State

already has determined for itself that such probably cause exists.

There must be a determination made by a judicial officer either before or promptly after the child has been institutionalized that there is probable cause to believe that the minor needs to be committed. Then in light of the long-term institutionalization that can occur if such a determination is made, the minor must be assured of some timely hearing affording him or her all of the protection provided in *In re Gault, supra*, all of the protection provided by the state juvenile justice systems.

Neither Pennsylvania nor Michigan law provide such protection.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

GARY KOLB
Legal Services of
Eastern Michigan
412 Genesee Bank Building
Flint, Michigan 48502
Attorney of Record

GABE KAIMOWITZ
Michigan Legal Services
900 Michigan Building
220 Bagley Avenue
Detroit, Michigan 48226
Attorney
Amicus Curiae Michigan
Legal Services and Legal
Services of Eastern Michigan

Date: August, 1976

APPENDIX A

FUND RAISING NEWSLETTER

MICHIGAN ASSOCIATION FOR EMOTIONALLY
DISTURBED CHILDREN
668 Pallister Avenue
Detroit, Michigan 48202
313/TRINITY 3-3660

July 2, 1976

Dear Members and Friends of MAEDC,

A recent development of major national importance presents MAEDC with the greatest challenge that we have faced in our 19 year history.

The United States Supreme Court has authorized MAEDC's intervention in the Pennsylvania lawsuit, *Kremens* v. *Bartley*, involving the right of the disturbed child to voluntary hospital treatment. Our participation in this lawsuit was requested by the Attorney General, State of Pennsylvania, because of our effective involvement in similar litigation here in Michigan.

As you know, MAEDC has intervened in two Michigan lawsuits to defend the right of children to voluntary hospitalization. In 1974, and again in 1975, we were compelled to enter cases which would have denied voluntary admission to children.

MAEDC has also fought for judicial protections for the child. The Objection sections of the Michigan Mental Health Code, strongly supported by us, permits any child who does not wish to be in the hospital the right to a court hearing. Equally vital, of course, is the right to voluntary admission without court intervention if the child so wishes.

The question in the lawsuit which is now before the United States Supreme Court is clear: must a child be subjected to an adversary court hearing contrary to his wishes in order to be admitted to a children's inpatient mental health program?

The decision to be made by the United States Supreme Court will be momentous. It will not only determine the disturbed child's right to voluntary treatment, it will also have a far-reaching impact on the relationships between parent and child.

APPENDIX B

DETROIT NEWS ARTICLES

BOY CHALLENGES COMMITMENT TO MENTAL INSTITUTION

By MICHAEL BROGAN
News City-County Bureau

Do parents have the legal right to place a minor child — below age 18 — in a mental treatment facility against the child's wishes and without a court order?

The question is the crux of a legal battle in Wayne Circuit Court where a 15-year-old Westland boy charges he is being illegally detained at the Hawthorn Center in Northville.

The center, operated by the Michigan Department of Mental Health, treats emotionally and mentally disturbed youngsters below age 18.

The boy maintains that his placement in the center last Dec. 18 was illegal because he does not want to be there and because there have been no Probate Court hearings either to adjudge him mentally ill or to order his commitment.

The boy's charges brought a list of countercharges from lawyers for his parents and the state.

The boy's lawyer, Gabe Kaimowitz, of the Michigan Legal Service Assistance Program, a federally funded agency, says he would not have objected to the boy being placed in the center if his parents had followed correct legal procedures.

He added, however, that they did not, and the boy wants to be released and placed in a foster home.

ATTORNEY ARTHUR CARPENTER, representing the parents, says the boy has had a history of emotional disturbances and his parents are "afraid to have him at home."

Arthur D'Hondt, an assistant Michigan attorney general representing Hawthorn Center, says Wayne Circuit Court has no jurisdiction in the case; that it should be heard by Wayne Probate Court.

The boy took the witness stand yesterday and told Circuit Judge James N. Canham that although his stay at the center has been livable," I don't want to stay there.

"I would like to be placed in a foster home if that is possible. I can't get along with my parents."

He said since being placed in the center by his father, he has not been allowed to make phone calls, although he is allowed to receive them from his lawyer.

Dr. Ralph Rabinovich, clinical director of the center, who has known the boy for five years, testified that he treated him in the past and characterized him as a "severely emotionally disturbed boy in desperate need of psychiatric treatment."

Dr. Rabinovich said the boy should not stay at home with his parents because he is likely to become "aggressive and subject to sadistic rages."

Both D'Hondt and Carpenter said they consider placement of the boy in Hawthorn legal, since the boy's father signed necessary admission papers.

DR. RABINOVICH said he advised the boy's parents to send him to the center, adding that "they did so out of concern for the boy."

Kaimowitz contends, however, that the parents' action amounted to "saying that anytime they don't want a child around they can send him off to an institution without considering his legal rights or feelings."

But D'Hondt says Kaimowitz' argument is "ridiculous if carried to its very illogical conclusion."

"By following that argument," D'Hondt said, "you would have to argue that whenever a parent wanted to place a child in a hospital for a needed operation the parent would have to get a court order allowing detention in the hospital."

Kaimowitz said, however, that state laws applying to treatment of mental ailments are different than those applying to a parent's legal responsibility to care physically for a child.

The boy was placed in the Hawthorn Center after a series of incidents that began Oct. 29, when he was arrested by Ann Arbor police as a truant, the same day his parents filed a delinquency complaint against him in Wayne County Juvenile Court.

THE NEXT DAY, the boy was taken before a Wayne Juvenile Court referee for a preliminary hearing. At that time, although the youth's parents were not present, Kaimowitz said the Washtenaw County Catholic Social Services agency had arranged for a foster home for the boy.

The referee released the boy to the social services agency, but on Nov. 2 the boy's parents sought an order in Washtenaw Circuit Court to gain custody of the child.

Judge William F. Ager ordered the boy returned to his parents for a week while a new petition was filed in the Wayne Juvenile Court concerning the boy's alleged delinquency.

While that petition was pending, the boy lived with his parents. On Dec. 1, Wayne Juvenile Judge James H. Lincoln disqualified himself from hearing the case and (sent it) to Presiding Probate Judge George N. Bashara.

On Dec. 18, while hearings before Bashara were pending, the boy's father took him to the Hawthorn Center.

GRANDPARENTS TO TAKE BOY COMMITTED AGAINST HIS WILL

By MICHAEL BROGAN
News City-County Bureau

A 15-year old Westland boy who sued to gain his release from a mental treatment center has received his parents' permission to live with his maternal grandparents.

They told Wayne Circuit Judge James N. Canham yesterday he can live with his grandparents at least until Wednesday when a hearing on a delinquency complaint they filed against their son is heard by Wayne Probate Judge George N. Bashara.

The parents placed the boy Dec. 18 in the Hawthorn Center in Northville, which treats mentally and emotionally disturbed youngsters below age 18. It is operated by the Michigan Department of Mental Health.

The boy's lawyer went into Canham's court Wednesday seeking a writ that would free him from the Hawthorn Center.

The lawyer, Gabe Kaimowitz, charged that the boy was being illegally and involuntarily held at the center because no court order had been entered adjudging him mentally ill or calling for commitment.

The parents' lawyer, Arthur Carpenter, told Canham the parents were afraid to keep their son at home.

Dr. Ralph Rabinovich, clinical director of the center, testified that the boy has a five-year history of emotional problems and is likely to become violent if frustrated.

He said the boy is in "desperate need of psychiatric treatment."

Canham said he planned to call the parents to the witness stand yesterday.

When the hearing began, the parents agreed to place the boy with his grandparents in Detroit.

Kaimowitz had said that if a court order had been issued calling for the boy's commitment, "I would have no objection."

"But it wasn't ordered and everytime a parent doesn't want a child around, the parent just can't have him committed someplace," Kaimowitz said.

APPENDIX C

LETTER AND SECTION 8 ON FAMILY CASE

State of Michigan
Office of
ALBERT LEE, C.P.A.,
Auditor General
Lansing

July 10, 1975

Dr. Donald C. Smith, Acting Director
Department of Mental Health
Lewis Cass Building
Lansing, Michigan

Dear Dr. Smith:

Herewith is presented our report on the audit of Caro Regional Center for the period April 1, 1971 through April 30, 1974. Our examination was made in accordance with generally accepted governmental auditing standards, and accordingly included such tests of the accounting records and other auditing procedures as were necessary.

Our comments, recommendations, description of agency, and scope of audit follow this letter.

The courtesy and cooperation extended to our auditors by your staff and the center's staff during the course of our examination is appreciated.

Very truly yours,

/s/ Albert Lee, C.P.A.
Auditor General

8. Our review of resident (family care) case files disclosed that the center's staff had determined that five residents in family care homes are not mentally retarded or epileptic. The residents had been transferred to Caro Regional Center from another State institution in March and July 1972. The residents had been originally committed due to early cultural deprivation.

These five residents have been under the jurisdiction and funding (100% State funds) of the Department of Mental Health for a cumulative total of 49 years. They remained under department jurisdiction and funding for a cumulative total of 32 years after individual determinations were made that they were not retarded.

Since they have normal intelligence, they do not require the level of care purchased by the center, but rather the less expensive level of foster care available to foster children provided by the Department of Social Services. Center personnel agreed with us and extensive efforts have been made to remove the residents from the jurisdiction of the Department of Mental Health. However, because of a lack of established procedures, their efforts have not been successful.

We recommend that the center in conjunction with the Department of Mental Health, the Department of Social Services, and the Probate Court develop a procedure whereby the children can be released from Department of Mental Health jurisdiction and returned to the court's jurisdiction. Funding and supervision of children's placement should be provided by the Department of Social Services.

APPENDIX D

ORDER

State of Michigan
In The Circuit Court For The
County Of Wayne

At a session of said Court held in the City-County Building, City of Detroit, County of Wayne, Michigan, on the 26th day of February, 1974.

PRESENT: Honorable Victor J. Baum, Circuit Judge.

The parties hereto acting by their respective counsel, having consented to the entry of this order and having agreed as follows:

1. A complaint and other documents have been filed in this cause.

2. If true, the allegations could not be condoned under the Constitution of the United States, the Constitution of Michigan and the laws of this state.

NOW, THEREFORE, the parties by their respective counsel stipulate and agree as follows:

A. The State Department of Mental Health will immediately cease any and all experimentation, including experimental aversive conditioning, on children institutionalized in state mental health facilities, and will, in the future, no longer permit such experimentation or research, *such as the Zinc or C-14 Tryptophan studies at Lafayette Clinic, where the work has no basis in individual treatment of the physical illness of such child.*

B. The State Department of Mental Health will no longer permit experimental treatment to be used on any children institutionalized in a state mental health facility unless:

(1) the need for the use of experimental treatment arises out of a course of individual treatment of the physical illness of such child; and

(2) established therapies for the child's illness have been exhausted; and

(3) the consent of the child to the use of such experimental treatment has been obtained beforehand.

C. The State Department of Mental Health will not receive for detention and treatment any child unless and until a full judicial hearing has been held at which a legal determination has been made that such child is mentally ill, epileptic or handicapped as defined in Michigan law pursuant to constitutional requirements.

D. The State Department of Mental Health will petition or cause to be petitioned a court of competent jurisdiction for determination as to whether each child presently institutionalized in a state mental health facility is mentally ill, epileptic or handicapped. Unless such a determination has been made for each child within 150 days from the entry of this order, the State Department will return the care and custody of the child to the appropriate parent, guardian or custodian or if the parent, guardian or custodian is unable or declines to receive the child, then the department will cause a petition or other appropriate pleading to be filed with a court of competent jurisdiction (Circuit Court or Probate Court, Juvenile Division). The above time period shall be tolled during any period of adjournment which has been requested by the child's legal counsel. It is intended and hereby

provided that the foregoing is intended to deal with children in the care and custody of the State Department of Mental Health where such custody is not pursuant to hearing and court order. Nothing herein shall be taken to prevent Plaintiffs' representatives and counsel associated with them from providing legal assistance to a child within the scope of this order at the judicial review initiated by the aforementioned petitions.

E. The State Department of Mental Health will return to the care and custody of the appropriate parent, guardian or custodian any child who they are detaining and treating at a state mental health facility pursuant to an order of commitment, unless judicial review is afforded to such child at six month intervals from the date of the original commitment order. The purpose of this review, which is to be conducted in the same manner as the initial hearing described above, is to determine whether the child continues to meet the criteria for confinement and treatment at a state mental health facility.

F. The State Department of Mental Health will immediately make available for public inspection all proposals, protocols and other documents relating to experimentation or research being proposed or carried on in or for the department in state mental health facilities. This will not preclude any common law, statutory or constitutional defenses raised by any of the parties.

G. The State Department of Mental Health in or for the Department will immediately make available for inspection all individual consent forms after ensuring, through appropriate means, that the identity of individual subjects for experimentation is kept confidential. This will not preclude any common law, statutory or constitutional defenses raised by any of the parties.

H. The court reserves and retains jurisdiction of this cause to review and examine any action taken or not taken in implementation of this order and, upon due notice and hearing, to modify or alter this order to obtain compliance therewith.

I. The department and each of its divisions, institutions and its superintendents and each employee responsible for children who are institutionalized in mental health facilities shall receive a copy of the complaint (without documents) and a copy of this order no later than 30 days after its entry.

Circuit Judge (unsigned)

Consent of Counsel

The parties hereto, by their respective counsel, consent to the entry of the foregoing order and agree to the contents thereof.

FRANK J. KELLEY
Attorney General

/s/ Milton I. Firestone (P 13447)
Assistant Attorney General

/s/ Thomas R. Wheeker (P 22228)
Assistant Attorney General
740 Law Building
525 West Ottawa Street
Lansing, Michigan 48913

Dated: February 26, 1974

/s/ Clarice Jobes (P 15504)
Jobes, LeBost & Farrior, P.C.
408 Michigan Building
220 Bagley Avenue
Detroit, Michigan 48226
Petitioner and Attorney for
Petitioner-Plaintiffs

/s/ Gabe Kaimowitz (P 15654)
Michigan Legal Services
Assistance Program
Wayne State University Law School Annex
Detroit, Michigan 48202
Co-counsel for Petitioner-Plaintiffs

Dated: February 26, 1974

Annina Mitchell Dahm
Miriam Eichenhorn
Students at Wayne State University
School of Law
Practicing under GCR 921 for
Petitioner-Plaintiffs

APPENDIX E

LETTER OPINION

State of Michigan
Department of Attorney General

Item B
(Filed February 19, 1974)

Dr. E. G. Yudashkin, Director
Department of Mental Health
Lewis Cass Building
Lansing, Michigan 48926

Dear Dr. Yudashkin:

As you know, suit was filed earlier this month against the Department of Mental Health, yourself, as Department Director, and various physicians employed at the Lafayette Clinic.

That lawsuit raises three major issues concerning:

1. public access to information relating to experimentation conducted on mental patients in department institutions,

2. commitment procedures with regard to minors, and

3. consent to medical experimentation on minors in department institutions.

In view of the issues raised in this lawsuit, I would appreciate an immediate reply concerning the policy and procedure the Department of Mental Health and its facilities follow in each of these areas.

Meanwhile, I take this opportunity to advise you as follows:

1. Minors are, by law, committed to the Department of Mental Health for care and treatment of mental disorders. The department may not conduct experiments

on such minors unless the particular experiment contributes directly to the individual minor's care and treatment.

2. While the issue of what constitutes valid legal consent on the part of a child for experimentation has not been decided by a Michigan court, the decision of a three-judge panel in the recent case of *Doe* v. *Yudashkin* (the psychosurgery case) is instructive. In that case, the court ruled that an adult patient was not in a position to give truly voluntary consent to a dangerous procedure offering minimum, if any, benefits to that patient. In the case of a child, it would seem that the coercive atmosphere of a mental institution as was shown by testimony in the *Doe* case, combined with the youth of the potential experimental subject, would be such that a child could never be said to truly voluntarily consent to an experiment, particularly when it is unlikely that he would ever truly understand what he was consenting to.

Since the child could not consent, the experiment could not be conducted. While it is true that a parent can consent of behalf of a child to medical procedures which are necessary to preserve the health of the child, e.g., *Bakker* v. *Welsh*, 144 Mich 632 (1906), nationally, cases have held that this does not empower the parent to make his child a guinea pig. The parent has no authority to subject his child to medical procedures which are not designed primarily for the benefit of that child.

I also call your attention to the following statement set forth in the recently issued guideline of the Department of Health, Education and Welfare covering this subject:

> "There is no firm legal basis . . . for parental or guardian consent to participation in research on behalf of subjects who are incompetent, by virtue of age or mental state, to understand the information provided and to formulate the judgments on which valid consent must depend . . . ." Federal Register, Vol. 38, No. 221, Friday, 11/16/73, p. 31739

It is my feeling, based upon my study of current court decisions and applicable circumstances, that persons confined to institutions, particularly children, may not be able to give truly voluntary consent in such matters. It must also be recognized that persons encumbered with economic or custodial responsibility for the mentally infirm may not be sufficiently objective to make judgments which are fully in the best interest of the institutionalized person as it relates to research, development or demonstration activity.

It must also be kept in mind that despite all the protection afforded by various research committees certain children are categorically excluded from participating in research involving risk. These include children with no natural or adoptive parents available to participate in consent deliberations and children detained in department facilities by court order.

3. The Administrative Procedures Act's provision that a state agency shall make available for public inspection "written statements which implement . . . law, rules or policy, including . . . guidelines, mannuals and forms . . ." is applicable to the Department of Mental Health, provided the material involved is not covered by the doctor-patient exemption.

I urge you to make the foregoing available to all superintendents of all institutions subject to your jurisdiction at once.

Sincerely yours,

/s/ Frank J. Kelley,
Attorney General

APPENDIX F

LETTER OF THE CHAIRMAN

HOUSE OF REPRESENTATIVES
Lansing. Michigan 48901
Chairman; Judiciary Committee

July 15, 1976

MEMO TO: The Honorable Anthony Derezinski, The Honorable Thomas Anderson

FROM: Paul A. Rosenbaum, Chairman, House Judiciary Committee.

This will supplement my letter of July 9, 1976.

I wish to personally request that, if the Joint Administrative Rules Committee is going to initiate any or all of revised Rule 330.7021 of the Administrative Rules of the State Department of Mental Health, I wish to have an opportunity to personally appear in front of the Committee to testify on this issue.

Also, would you extend to me the courtesy of inviting Mr. Kaimowitz, of the Michigan Legal Services, to appear at the same time so that the Committee may be apprised of his comments as well as mine.

It is my understanding that the emergency rules presently in effect will remain in effect unless the Joint Administrative Rules Committee acts on the revised Rule 330.7021.

Thanking you in advance for your cooperation.

cc: Paul Tarr, Gabe Kaimowitz

PAR/sf

APPENDIX G

EMERGENCY RULE

R 330.7021. Research or treatment procedures which place recipients at risk.

Rule 7021. (1) A recipient shall not be the subject of a medical or social research or treatment procedure if the research or procedure places subject at risk, unless the requirements of this rule are met to insure the protection of the recipient.

(2) As used in this rule:

(a) "Subject at risk" means an individual who may be exposed to the possibility of injury, including physical, psychological, or social injury, as a consequence of participation as a subject in research or as a consequence of a treatment procedure which departs from application of established and accepted activities necessary to meet the individual's needs, or which increases the ordinary risks of daily life, including the recognized risks inherent in a chosen occupation or field of service.

(b) "Medical and social research or treatment procedures which place subjects at risk" include not yet accepted or established procedures accepted and established procedures used in a manner other than recommended or prescribed, behavior modification involving use of noxious or aversive stimuli, electric shock, lobotomy, or other psychosurgical procedures, and organ transplants or other surgical procedures which are of other than therapeutic benefit to the recipient.

(3) Research or procedures which place a subject at risk shall not be conducted or sponsored by a provider unless a committee established by the facility director has reviewed and approved the activity.

(4) A recipient shall be the subject of a medical or social research or treatment procedure which place him at risk only if he is 18 years of age or over and competent, with his express and informed consent, and with an opportunity for consultation with legal counsel and independent medical specialists. Proposed research or procedures meeting the definition in rule (2b) shall be reviewed and approved by the committee before consent is sought.

(5) Recipients whose freedom and rights are, or potentially are, subjected to limitation may not be subjects of research unless a proposed activity is related to the etiology, pathogenesis, prevention, diagnosis, or treatment of mental disability or retardation or the management, training, or rehabilitation of the mentally disabled or retarded and seeks information which cannot be obtained from subjects who are not recipients.

(6) A review committee shall:

(a) Determine whether subjects would be placed at risk, and, if risk is involved, whether:

(i) Risks are outweighed by the sum of the benefit to subjects and the importance of the knowledge to be gained and thereby warrant a decision to allow subjects to accept these risks.

APPENDIX H

ORDER APPOINTING NEXT FRIEND

United States District Court
Eastern District Of Michigan
Southern Division

JOHN (DOE)
a minor, by his next friend,
TOM WOJCIEHOWSKI, individually,
and on behalf of all other
minors similarly situated,
Plaintiff,

THE DIRECTOR OF THE MICHIGAN
DEPARTMENT OF MENTAL HEALTH,
in his official capacity, and
his successors, assignees, employees and agents;
VERNON STEHMAN;
WILLIAM KIRK;
HARVEY DAY,
in their official capacities as employees and
agents of YPSILANTI STATE HOSPITAL and
THE MICHIGAN DEPARTMENT OF
MENTAL HEALTH.

v Civil Action 75-72318

This action seeks to challenge the Formal Voluntary Admission provisions of the Michigan Mental Health Code, MSA §§14.800 (415) (420), insofar as these provisions permit the admission of minors into state mental facilities upon the application of their parents or guardians without a prior judicial finding that commitment is appropriate.

The named plaintiff was eleven years old at the time the complaint was filed on November 26, 1975. On December 10, 1975, a motion was filed requesting the appointment of TOM WOJCIEHOWSKI as next friend for the named minor plaintiff. The defendants and the parents of the minor plaintiff, who sought to intervene in the action, opposed the appointment of Mr. WOJCIEHOWSKI, and, indeed, objected to the maintenance of the action on behalf of the child at all. A hearing was held, at which counsel for the parties and for the proposed intervenors argued this question. The Court indicated its intention to permit intervention by the parents, but did not so order, because it did not believe such a step would be appropriate until a decision was rendered on the designation of a next friend.

Following the hearing the Court requested that the parties file briefs on the question of the appointment of a next friend and make suggestions regarding an appropriate person to be so appointed. Counsel for plaintiff, defendants, and intervenors have filed such briefs.

The position taken by the intervenors is essentially that the parents are the real representatives of the child and that the Court should appoint no one in their place. However, if the constitutional right of the minor plaintiff has been violated, it must be alleged to be through the joint action of the state and the parents. Where there is a potential conflict between the interests of parent and child, the Court may be required to appoint a next friend other than the parents. See *Saville* v. *Treadway*, No. 6969 (M.D. Tenn. March 8, 1974) (three-judge court) (Exhibit G, appendix to plaintiff's Memorandum).

The defendants argued that a "neutral" attorney be appointed next friend. No specific suggestions were made.

The Court has independently sought to locate an appropriate neutral person to serve as next friend for the minor named plaintiff; however, it has been unable to locate a suitable person.

At the hearing on plaintiff's motion, the Court indicated that it believed there might be conflict in the appointment of Mr. WOJCIEHOWSKI. This concern stemmed from the Court's impression that Mr. WOJCIEHOWSKI was still employed at that time by a state agency and was still in a position in which he had or in the future might have a professional responsibility for the care of the minor plaintiff. The Court believed that such a situation would result in a conflict in his two roles: in one role as a next friend challenging the statute requiring care while at the same time providing that care, and, further, that if he were the appropriate professional to be caring for the minor child that he should not cease to do so because of his other role as next friend. However, re-examination of the documents submitted with the motion indicates that Mr. WOJCIEHOWSKI has not only ceased to be employed at the Yorkwood Center of Ypsilanti State Hospital but is also no longer in contact with the minor plaintiff as a "big brother." These facts remove the conflict with which the Court was concerned.

Defendants have objected to the appointment of Mr. Wojciehowski or plaintiff's attorneys of the ground that they have an underlying desire to at tack the statute that might overcome their concern for the welfare of the particular named plaintiff. The Court believes that this objection is more applicable to the attorneys for plaintiff than to Mr. WOJCIEHOWSKI. His intial contact with

the child was as a group leader at the Yorkwood Center for Children at Ypsilanti State Hospital. He was the person designated by the child to receive a copy of the formal voluntary admission application. It was he who contacted the attorneys who filed this action. Insofar as defendant and intervenor's argument is that Mr. WOJCIEHOWSKI's institution of this suit indicate that he will not fairly represent the interests of the child, such an objection begs the question. Mr. WOJCIEHOWSKI has apparently made a judgment that the commencement of this action is in the best interests of the child. If the fact of having made such a judgment must be taken as disqualifying a prospective next friend, then any person seeking to bring an action as a next friend for a minor would be similarly disqualified. The Court sees no reason to believe that Mr. WOJCIEHOWSKI did not make a good-faith judgment that this action should be commenced or that he will not continue to exercise such judgment.

In view of these factors and the Court's inability to locate another suitable next friend, the Court's inability to locate another suitable next friend, the Court will appoint TOM WOJCIEHOWSKI next friend for the named minor plaintiff in this action.

Counsel for plaintiff stated that she was concerned that she have access to the named plaintiff and expressed the view that the parents of the child were inhibiting such access. The Court has been shown no purpose requiring such contact. Plaintiff's counsel have presented nothing that would show that any facts within the knowledge of this particular minor plaintiff will be of any importance to the determination of this suit. This action involves a

constitutional issue that relates to the statute's basic scheme, rather than to its particular application to this plaintiff. Indeed, plaintiff's counsel analogize this action to cases in which courts found no need to appoint next friends because the suits concerned "narrow legal issue[s]." Memorandum of Law in Support of the Appointment of a Counsel for Plaintiff or any other Suitable Person as Next Friend, at 10.

Accordingly, the Court will enter no order directing either the intervening parents or the defendants to permit Mr. WOJCIEHOWSKI, or counsel for plaintiff to have access to the minor child. If plaintiff's counsel become aware of any particular reason why such contact is necessary they may make a written application to the Court with notice to the other parties. The Court recognizes that this procedure may prevent Mr. WOJCIEHOWSKI from becoming aware of facts that might lead him to dismiss or otherwise alter the course of this action. However, the Court is of the opinion it is in the best interest of the child that contact between the next friend or plaintiff's attorneys and the minor is likely to cause conflict between them and the parents and parents and child that would not be beneficial to the child.

CORNELIA G. KENNEDY
United States District Judge

March 9, 1976
Detroit, Michigan

APPENDIX I

ORDER
AMENDING TITLE OF CASE AND
DIRECTING CLERK TO CORRECT COURT RECORDS

United States District Court
Eastern District Of Michigan
Southern Division

TOM WOJCIEHOWSKI,
Next friend of JOHN DOE, a minor, Plaintiff,

v No. 75-72318

THE DIRECTOR OF THE MICHIGAN
DEPARTMENT OF MENTAL HEALTH, Defendant.

This action was filed on behalf of an eleven year old child, seeking to challenge the Formal Voluntary Admission provisions of the Michigan Mental Health Code, MSA §§ 14.800 (415) to (420), insofar as that statute permits the commitment of minors to state institutions without a prior judicial finding that such commitment is appropriate.

In its Order entered March 9, 1976, the Court appointed TOM WOJCIEHOWSKI as next friend for the minor plaintiff. In view of this fact and the Court's opinion that it is desirable to minimize the public exposure of the particular minor plaintiff, the Court HEREBY ORDERS that THE TITLE OF THIS CASE BE AMENDED TO READ:

TOM WOJCIEHOWSKI,
Next friend of JOHN DOE, a minor,
on behalf of JOHN DOE and all
others similarly situated,
Plaintiff,

THE DIRECTOR OF THE MICHIGAN DEPARTMENT OF MENTAL HEALTH, in his official capacity; and his successors, assignees, employees and agents; VERNON STEHMAN; WILLIAM KIRK; and HARVEY DAY, in their official capacities as employees and agents of Ypsilanti State Hospital and The Michigan Department of Mental Health,

Defendants.

The parties are ORDERED to file all subsequent pleadings under this amended title, and the Office of the Clerk of the Court is DIRECTED TO CORRECT THE COURT RECORDS TO REFLECT THIS CHANGE OF TITLE.

IT IS SO ORDERED.

CORNELIA G. KENNEDY
United States District Judge

Dated: March 9, 1976
Detroit, Michigan

APPENDIX J

ORDER GRANTING MOTION TO INTERVENE AS PARTIES DEFENDANT

United States District Court
Eastern District Of Michigan
Southern Division

TOM WOJCIEHOWSKI,
Next friend of JOHN DOE, a minor, on behalf of JOHN DOE and all others similarly situated,
Plaintiff,

v Civil Action No. 75-72318

THE DIRECTOR OF THE MICHIGAN DEPARTMENT OF MENTAL HEALTH,
in his official capacity, and his successors, assignees, employees and agents; VERNON STEHMAN; WILLIAM KIRK; and HARVEY DAY, in their official capacities as employees and agents of Ypsilanti State Hospital and The Michigan Department of Mental Health,
Defendants.

This action was filed on behalf of an eleven year old child, seeking to challenge certain features of the Formal Voluntary Admission provisional of the Michigan Mental Health Code, MSA §§ 14.800 (415) to (420). On March 9, 1976 the Court appointed TOM WOJCIEHOWSKI as next friend for JOHN DOE, the minor plaintiff;

The parents of JOHN DOE filed a motion to Intervene as Defendants. At the hearing on December

15, 1975, the Court indicated its intention to grant the motion but deferred its ruling until it had rendered a decision regarding the appointment of a next friend;

Accordingly, the motion of the parents to intervene as parties defendant IS GRANTED. In keeping with the Court's ORDER AMENDING TITLE OF CASE AND DIRECTING CLERK TO CORRECT COURT RECORDS, also entered this date, March 9, 1976, the Court DIRECTS that the parties refer to the intervening defendants as Mr. and Mrs. DOE. IT IS SO ORDERED.

CORNELIA G. KENNEDY
United States District Judge

Dated: March 9, 1976
Detroit, Michigan

APPENDIX K

ORDER CERTIFYING THAT SUIT MAY PROCEED AS CLASS ACTION

United States District Court
Eastern District Of Michigan
Southern Division

TOM WOJCIEHOWSKI,
Next friend of JOHN DOE, a minor, on behalf of JOHN DOE and all others similarly situated,
Plaintiff,

v | Civil Action No. 75-72318

THE DIRECTOR OF THE MICHIGAN DEPARTMENT OF MENTAL HEALTH,
in his official capacity; and his successors, assignees, employees and agents; VERNON STEHMAN; WILLIAM KIRK; and HARVEY DAY, in their official capacities as employees and agents of Ypsilanti State Hospital and The Michigan Department of Mental Health,
Defendants.

This is an action in which plaintiff challenges the constitutionality of the Formal Voluntary Admission provisions of the Michigan Mental Health Code. MSA §§14.800 (415) to (420). Plaintiff has filed a Motion for Class Action Order, requesting that a class be certified consisting of:

> all persons under 18 years of age who have been, now are or will be admitted to hospitals under the Formal Voluntary Admission sections of the Michigan Mental Health Code, MCLA 330.1415-1420 [MSA §14.800 (415) to (420)].

The Court should order that the action may proceed as a class action only if all four of the requirements of Federal Rule of Civil Procedure 23(a) and at least one of the requirements of Rule 23(b) are met.

The state defendants do not dispute that the first two requirements of Rule 23(a) are met: that the proposed class would be too numerous to permit joinder of all, or that there is a common question of law. They do argue that the claims of the named plaintiff are not typical of those of the class and that plaintiff would not adequately represent the class.

In one sense, of course, the claims are clearly typical: insofar as any member of the proposed class has a claim, it is indistinguishable from that of the named plaintiff, since all members of the class would be denied the same constitutional right by the application of the statute.

Defendants' real position is that the relief sought by the named plaintiff would in fact be harmful to the members of the class, rather than beneficial. There is no factual basis for such a finding in the record. If one assumes for the purpose of argument that the statute is constitutionally defective, the fact that some persons might be satisfied with it would not deprive plaintiff of the right to declaratory and injunctive relief that would affect the entire class.

Defendants' argument in reality presents a question to be decided when the three-judge court considers the merits of the action. The fact that some members of the class may be satisfied with the treatment they receive is not grounds for refusing to certify a class. See *Norwalk Core* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, 937 (2d Cir. 1968). See also *Knuth* v. *Erie-Crawford Dairy Cooperative Association*, 395 F. 2d 420, 428 (3d Cir. 1968); *Lamb* v. *United Security Life Company*, 59 F.R.D. 25, 31-32 (E.D. (S.D. Iowa 1972).

The claim that this is an appropriate case for class certification is supported by the decisions of several three-judge district courts to permit class actions in very similar cases. See *Kidd* v *Schmidt*, No. 74-C-605 (E.D. Wisc., Aug. 15, 1975); *Bartley* v *Haverford State Hospital*, No. 72-2272 (E.D. Pa. April 29, 1974).

The fact that the named minor plaintiff may not be in Ypsilanti State Hospital continuously does not mean that he cannot represent the class, since he remains subject to readmission under the challenged portion of the statute. *Kidd* v. *Schmidt*, *supra*, at 3.

In regard to the question of whether the named plaintiff will adequately represent the class, there seems little doubt that plaintiff and counsel will vigorously prosecute this action. Indeed, part of the objection raised by defendants seems to be based on the defendants' concern that counsel will be too vigorous.

They argue that the relief requested by plaintiff would not be that sought by most of those in the class. The Court sees no basis on which it could find that the class members would not desire a remedy for a (presumed) violation of their right to due process of law. Defendants' position goes to the merits of the action which must be considered by the three-judge court, rather than by a single judge considering a motion for class certification.

The Court is of the opinion that the requirements of both Rule 23(b)(1) and 23(b)(2) are met, and defendants apparently do not disagree. What defendants do argue is that some notice should be given to the class members. As defendants recognize, the rule does not require notice. Fed. R. Civ. Pro. 23(c)(2). Defendants provide no authority for their assertion that due process requires notice of this action. See *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 177 (1974).

Accordingly, the Court determines that this suit may appropriately proceed as a class action pursuant to Federal Rule of Civil Procedure 23, on behalf of all persons under 18 years of age who have been, now are or will be admitted to hospitals under the Formal Voluntary Admission provisions of the Michigan Healt. Code, MSA §§ 14.800(415) to (420).

IT IS SO ORDERED.

CORNELIA G. KENNEDY
United states District Judge

Dated: March 12, 1976
Detroit, Michigan

APPENDIX L

ORDER APPOINTING NEXT FRIEND

United States District Court
Eastern District of Michigan
Northern Division

As a session of said court, held in the Federal Building, Flint, Michigan on March 22nd, 1976

Present: HONORABLE JAMES HARVEY, United States District Judge

On November 28, 1975 plaintiff moved to appoint Mr. David Wineman as a substitute Next Friend, having determined that Mrs. Edna White was not a proper person to be so appointed.

Defendants filed their response in opposition to the motion to substitute next friend on December 12, 1975. The main objection to the proposed substitute Next Friend is that Mr. Wineman may have a personal interest in this action which is opposed to the interest of the plaintiff.

Having reviewed the above mentioned motion and the legal memoranda in support thereof and in opposition thereto, as well as the supporting documentation, records, and the sworn affidavits of the plaintiff and the proposed Next Friend, the Court finds the following:

1.) Plaintiff is a seventeen year old minor;

2.) The present Next Friend, Mrs. Edna White is unsuitable as a Next Friend for there may exist a conflict of interest;

3. Plaintiff has voluntarily chosen a substitute Next Friend by the name of David Wineman;

4.) Mr. David Wineman is a Professor of Social Work at Wayne State University who has had the occasion to meet and talk with the plaintiff;

5.) Mr. David Wineman is willing to act as Next Friend of the plaintiff Deborah White;

6.) There is no conflict of interest between the proposed substitute Next Friend and the plaintiff;

Based on the above findings, the Court concludes that Mr. David Wineman will adequately protect the minor plaintiff's interest in this action and therefore Mr. Wineman shall be appointed as the Next Friend of plaintiff in lieu of Mrs. Edna White, the present Next Friend.

Now, then, IT IS HEREBY ORDERED that the Motion to Appoint a Substitute Next Friend is GRANTED.

/s/ James Harvey
United States District Judge

APPENDIX M

ORDER DENYING CERTIFICATION OF SUIT AS CLASS ACTION

United States District Court
Eastern District of Michigan
Northern Division

At a session of said court, held in the Federal Building, Flint, Michigan on March 22nd, 1976

Present: HONORABLE JAMES HARVEY, United States District Judge.

On October 17, 1975 plaintiff filed a Motion for Class Action Order. Plaintiff asserts that this action is properly maintainable as a class action under Rule 23(a), 23(b)(1) and (b)(2) of the Federal Rules of Civel Procedure on behalf of all persons under eighteen years of age who have been, now are or will be admitted to hospitals under the Formal Voluntary Admission sections of the Michigan Mental Health Code, MCLA 330.1415-1420.

Defendants filed a brief in opposition to the Motion for Class Action Order on December 12, 1975.

Having reviewed the motion and briefs in support thereof and in opposition thereto, the Court finds that this action may be properly maintainable as a

class action with regard to the prayer for declaratory and injunctive relief only for those persons under eighteen years of age who have been, now are or will be admitted to hospitals under the Formal Voluntary Admissions sections of the Michigan Mental Health Code, MCLA 330.1415-1420. The above finding is in accord with the Court's ruling in the companion case of *Wojciehowski* v. *Michigan Dept. of Mental Health* (No. 75-72318, ED Mich March 12, 1976).

However, it is unnecessary at this time to certify this action as a class action since there has been such a certification in the companion case. The class as designated in Case No. 75-72318 encompasses the same members as contemplated in the instant motion. As a matter of fact and law the minor plaintiff in this case has become a member of the class designated in the companion case for there is no notice requirement to plaintiff to make her a member of the named class and plaintiff has not specifically opted out of class as designated. There can be no further purpose served by also certifying this action as a class action given the above circumstances.

Therefore, IT IS HEREBY ORDERED that the plaintiff's Motion for Class Action Order is DENIED.

/s/ James Harvey
United States District Judge

APPENDIX N

MEMORANDUM OPINION

United States District Court
Eastern District Of Michigan

This is a motion to dismiss which has been filed by five of the named defendants, all of whom are employees of the State of Michigan (hereinafter referred to as State defendants), pursuant to Rule 12(b)(1),F R Civ P. It is asserted that the Court lacks jurisdiction over the first of plaintiff's three causes of action.

The facts as they appear in the complaint are as follows. Prior to December 17, 1974, plaintiff was residing in the home of her mother-in-law, Edna White. On that date she was taken into custody by Saginaw Police officers, detained briefly at a police facility, and finally transported to Saginaw Community Hospital, all allegedly at the request of defendant Francis Cook. Defendant Cook, acting as a person *in loco parentis*, signed a Formal Voluntary Admission Application on December 18, 1974 which resulted in plaintiff's admission into the Adolescent Psychiatry Unit of the hospital. This procedure was carried out pursuant to Section 415 through 420 of the Michigan Mental Health Code (MCLA 330. 1415-1420; MSA 14.800 (415)-(420)). On January 2, 1975, Edna White contacted attorneys for Legal Services of Eastern Michigan and requested them to visit plaintiff at the hospital. Plaintiff told the attorneys that she was about to be taken to Odyssey House, a facility in the State of New York, and indicated that she did not wish to go there. She signed an affidavit at that time indicating her desire to be free of

confinement. Late in the afternoon of January 2, 1975, one of the attorneys informed defendant Cook, and defendants Monica Lasarge and Paul Chapman that plaintiff did not wish to be sent to New York. On January 3, 1975, plaintiff was sent by airplane to Odyssey House. Once there, certain events occurred which are not important to this motion. It should be noted however, that plaintiff gave birth to a child in March of 1975 while at Odyssey House, and subsequent to that time both she and her child have returned to Michigan. The Court is aware that plaintiff is not confined in any institution at the present time.

Plaintiff alleges three causes of action, the first of which is brought on her own behalf and on behalf of all other persons similarly situated pursuant to Rule 23(a), 23(b)(1) and (b)(2), F R Civ P. The class action has yet to be certified. In the first count, plaintiff alleges that she and other members of her class are currently subjected to incarceration or confinement under the Formal Voluntary Admission Section of the Michigan Mental Health Code, *supra* for indefinite lengths of time without judicial hearings prior to or simultaneous with their confinement to determine (a) whether they have formally volunteered for admission or (b) whether they are to be involuntarily held as persons who are mentally ill and requiring treatment. A cause of action is claimed under Title 42 USC 1983 for deprivation of civil rights by all the named State defendants, said deprivation being capable of complete remedy only by enjoining the enforcement of MCLA 330.1415-1420 and declaring them unconstitutional.

In Count II, plaintiff alleges a conspiracy under Title 42 USC 1985(3) on the part of the State defendants and Odyssey House defendants to deprive her of her rights to liberty under the equal protection of the law. Count III

alleges a deprivation of liberty also, and seeks damages in excess of $10,000.00 for the unconstitutional and unlawful acts of all defendants for subjecting plaintiff to false arrest, false imprisonment, unwanted treatment, illegal transportation across state lines, intentional infliction of emotional distress, assault and battery, and misrepresentation and fraud.

A separate prayer for relief asks that plaintiff's cause be set down for hearing before a three-judge court and that MCLA 330.1415-1420 be preliminarily and permanently enjoined and declared unconstitutional on behalf of plaintiff and her class. On behalf of herself, plaintiff seeks $250,000.00 in damages against all defendants, jointly and severally.

28 USC 2281 provides that an injunction restraining the enforcement, operation or execution of any State statute may not be granted by a District Judge upon the ground of unconstitutionality of such statute unless the application therefor is heard and determined by a three-judge court as provided for by 28 USC 2284. Plaintiff has requested that a three-judge court be impaneled to hear her request for a preliminary and permanent injunction of the enforcement of MCLA 330.1415-1420. Oral arguments were heard regarding the request, which are at this time under advisement due to the intervention of several motions to dismiss filed by various defendants.

The State defendants have pointed out to the Court that when plaintiff left Saginaw County Community Hospital, she was discharged from that hospital. She was not admitted to Odyssey House pursuant to any provision of the Michigan Mental Health Code. Plaintiff is alleged to be a state ward and was placed in Odyssey House

pursuant to the authority of the Michigan Department of Social Services to control and care for state wards. Because plaintiff was not subject to any provision of the Michigan Mental Health Code for some time prior to the institution of this suit, nor having been so subjected since then, it is defendants' contention that "declarative and injunctive relief as to the constitutionality on the Michigan Mental Health Code can have no effect of plaintiff . . . any declaratory relief granted by this Court would be strictly an advisory opinion on a dead set of facts." (p. 5, defendants' brief) It is on this basis that dismissal of Count I is sought.

In order for a Federal Court to entertain a declaratory judgment action the complaint must set forth a live, actual controversy and not a moot, abstract or hypothetical one. *Aetna Life Ins. Co.* v. *Haworth*, 300 US 227 (1937); *Golden* v. *Zwickler*, 394 US 103 (1969). If plaintiff's request for declaratory and injunctive relief is in fact moot then there is no substantial federal question raised, there is no need to convene a three-judge court, and the defendants' motion to dismiss must be granted.

Plaintiff argues that there is a justiceable controversy between her and the State defendants for several reasons. First, it is contended that even if there is no live claim for injunctive relief, plaintiff's claim for damages is still alive and affords a basis for jurisdiction. Second, it is argued that this case falls within the rule that cases will not be mooted where they are capable of repetition yet evade review. Third, plaintiff believes this case to present a controversy over the continuing effects of defendants' past unlawful actions — the stigma of commitment.

Plaintiff's first cause of action clearly does not seek damages. That count is brought on behalf of plaintiff and the class she purports to represent and seeks declaratory and injunctive relief. While the count indicates plaintiff's belief that the portions of the Michigan Mental Health Code under which she was confined at the Saginaw County Community Hospital are unconstitutional, it is in Count III that plaintiff seeks damages for that confinement on her own behalf. There she characterizes the confinement under various common law torts such as false arrest and imprisonment. However, plaintiff characterizes her confinement as being unconstitutional. Thus Count III is also seen as seeking damages under 42 USC 1983.

Plaintiff notes that damages are proper relief in a 1983 action, and that even if she has no live claim for injunctive relief, the dispute over damages renders her cause justiceable. *Powell* v *McCormack*, 395 US 486 (1969). Defendants appear not to dispute this. In fact, they do not seek dismissal of plaintiff's second and third counts. The Courts agree with plaintiff that the dispute over damages is contested vigorously by the parties at this time. If plaintiff was illegally confined, there is no doubt but that a claim for damages is proper and not mooted by the fact that she is no longer confined.

Powell v. *McCormack*, *supra*, recognized that a damage claim may have at its foundation a claim that the defendants' initial actions were unconstitutional, and that declaratory relief is therefore proper and necessary to the ultimate disposition of damages. *Powell* was, in fact,

remanded to the District Court with instructions to enter a declaratory judgment in conjunction with Powell's claim for back salary. In the present case, a similar situation exists. Plaintiff cannot collect damages for her confinement unless it is shown that that confinement was pursuant to an unconstitutional statute. Thus plaintiff's request for declaratory relief is properly pleaded. See also *Super Tire Engineering Co.* v. *McCorkle*, 416 US 115 (1974); *Bosely* v. *City of Euclid*, 496 F2d 193 (CA 6 1974).

The next question is whether plaintiff properly requests injunctive relief. A related issue is whether a three-judge court is required if this Court finds that it has no jurisdiction over plaintiff's claim for injunctive relief. This Court can construe the constitutionality of the challenged sections of the Michigan Mental Health Code but may not, by itself, enjoin their enforcement by a State official. If the Code was found to be constitutional, there would be no need for an injunction; if not so found, then plaintiff could request further injunctive relief. See *Powell* v. *McCormack*, *supra*, p. 499.

If it is demonstrated that plaintiff's claim for injunctive relief is not a live controversy such as to give this Court jurisdiction over it, then plaintiff is left to her declaratory relief and damages. No three-judge court need be impaneled. Further, defendants' motion to dismiss would be proper as to the injunctive claim found in Count I. Plaintiff attempts to avoid this result by arguing that, while she is no longer confined, she is capable of again being subjected to confinement. It is urged that this case falls within the "capable of repetition yet evading review" doctrine. *Southern Pacific Terminal Co.* v. *ICC*, 219 US 498 (1911).

There is no doubt that admission to and confinement in a State Mental Institution is an example of "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." *Super Tire Engineering Co.* v. *McCorkle, supra*, p. 126. Plaintiff has shown that she was admitted to a mental institution upon the signature of an employee of the Michigan Department of Social Services. Assuming that plaintiff is a ward of the State and considering that she will be until she reaches the age of eighteen, her claim that she may again be signed into a mental hospital is not without foundation. It cannot be said at this time that it is a certainty that she will never again be subjected to the acts which she has complained of. Her first stay lasted for two weeks, which is barely enough time to start a lawsuit. A future stay may be for a similarly short period of time. As noted in *Medynski* v. *Margolis*, 389 F Supp 743,745 (DC 1975), "Inherent in mental health proceedings is the occurrence of short-term detention and/or confinement." Plaintiff has shown the existence of an immediate and governmental policy that has been brought to bear upon her interests to liberty and which remain available to affect those interests at any time. She has shown that policy to be one which can be so quickly exercised, and its effects so quickly subject to termination by actions of the State, that successful legal action will remain frustrated unless this case is seen to fall within the "capable of repetition, yet evading review" exception to the mootness doctrine.

Therefore, plaintiff's request for injunctive relief is not moot, and her first cause of action should not be dismissed. Plaintiff has raised various other contentions

in support of her opposition to the State defendants' motion. It is not necessary to examine those arguments in view of the conclusions which have been reached on what the Court believes to be the primary grounds for finding that a genuine controversy exists on all of plaintiff's causes of action.

Defendants Donald Smith, John Dempsey and Ernest Smith have filed a separate motion to dismiss in which they allege that the references to them in the complaint are so lacking in substance as to fail to state a claim against them. It is urged that they be dismissed pursuant to Rule 12(b)(6), F R Civ. P.

Defendants Smith, Dempsey and Smith are identified in paragraphs 8, 9 and 13 of the complaint as follows:

> "8. Defendant Director of the Michigan Department of Mental Health has the administrative responsibility for implementing and enforcing the Michigan Mental Health Code; said code includes the statutes in question herein, MCLA 330.1415-1420, which authorize the formal voluntary admission of persons under 18 years of age into hospitals for inpatient treatment as mentally ill persons."
>
> "9. Defendant Director of the Michigan Department of Social Services is responsible for all actions and operations of said Department, its employees and agents, as provided in MCLA 400, *et seq.*, including the administration of all public assistance programs and supervision of the actions of the local county departments when implementing programs that are in effect statewide. R. Bernard Houston is currently the Director of said Department; he is to be succeeded by John Dempsey on April 1, 1975."

> "13. Defendant Ernest Smith is the Director of the Saginaw County Department of Social Services and in that capacity is responsible to the United States and the State of Michigan for the implementation, administration and operation of all public assistance programs in Saginaw County, Michigan."

The standard for judging the sufficiency of a complaint is quite broad. Before a complaint will be dismissed, it must appear beyond a doubt that plaintiff can prove no set of facts in support of her claims which would entitle her to relief against these three defendants. See *Conley* v. *Gibson*, 355 US 41 (1957).

Under the above guidelines, it is clear that plaintiff has alleged sufficient facts to state a cause of action against each of the three defendants in question. First, with regard to defendant Donald Smith, plaintiff has specifically stated that he is responsible for implementation and operation of the Michigan Mental Health Code including that section at issue herein, MCLA 1415-1420. Thus, defendant Donald Smith has direct control over the operation of said statutes including their use to commit plaintiff herein to defendant hospital. In fact, Donald Smith's control is such that pursuant to MCLA 330.1404, he is responsible for "prescribing the forms to be used" under the Mental Health Code. It is undisputed that plaintiff's commitment was executed pursuant to the forms and instructions provided by defendant Donald Smith. Therefore, said defendant is intimately involved with actions being complained of in this case.

Defendant John Dempsey is directly involved with the dispute herein. As Director of the Department of Social Services, he is alleged to be charged with the care, control and custody of wards of the State. Defendant

State officials have themselves maintained that plaintiff is a ward of the State. Defendant Dempsey's authority, if any, is to provide the necessary and proper treatment of delinquent and neglected minors assigned to him, MCLA 400.115. In essence, the issue herein revolves around the decisions made by defendant Dempsey and others for the treatment of plaintiff and their alleged violation of her constitutional rights by their actions.

Similarly, defendant Ernest Smith, as Director of the Saginaw County Department of Social Services, is alleged to be directly involved in the care, treatment and decisions of State wards placed in his immediate custody. Plaintiff feels that upon discovery in this action, she may be able to demonstrate even greater personal involvement of Ernest Smith in the actions complained of herein. The Court notes that in plaintiff's third cause of action and in her prayer for relief, she has stated a cause of action in tort against defendant Ernest Smith. Therefore, defendant's motion will be denied.

Since plaintiff has demonstrated that an actual live controversy exists between her and the State defendants, and because she has demonstrated that substantial constitutional questions are involved in the claims which she asserts, this Court believes that a three-judge district court should be convened. An appropriate order will be signed.

/s/ James Harvey
United States District Judge

Dated: August 6, 1975